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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-514

THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, et al.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

SEPARATE APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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La Salle Street Press—Chicago/PrinterLink

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BEFORE THE INDIAN CLAIMS COMMISSION

The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, the Iowa Tribe of the Iowa Reservation in Oklahoma, et al., the Sac and Fox Tribe of Indians of Oklahoma, the Sac and Fox Tribe of Missouri, Sac and Fox Tribe of Mississippi in Iowa, et al.,

Petitioners,

v.

The United States of America,

Defendant.

Docket No. 135

Decided: July 2, 1958

FINDINGS OF FACT

The Commission makes the following findings of fact:

Petitioners

1. The Iowa Nation of Indians is comprised of petitioners (1) the Iowa Tribe of the Iowa Reservation in Kansas and Nebraska and (2) the Iowa Tribe of the Iowa Reservation in Oklahoma. Both of the petitioner tribes are residing within the territorial limits of the United States and are the sole successors in interest to the Iowa Nation of Indians, and, pursuant to the provisions of the Indian Claims Commission Act (60 Stat. 959) and on behalf of said nation and all its members, are entitled to present these claims, relative to the title and ownership of lands set forth in Finding 4 herein. (Iowa petitioners proposed finding 1; Defendant's finding 1) [464]

2. The Sac and Fox Nation, referred to in the petition as the "Confederated Sac and Fox" is comprised of three bands, petitioners herein, and, residing within the terri-

torial limits of the United States, are the successors in interest to the rights of the Sac and Fox Nation. These bands are: The Sac and Fox Tribe of Indians of Oklahoma, represented by individual member petitioners Edward Mack, Pauline Lewis and William Newashe; The Sac and Fox Tribe of Missouri, represented by individual petitioners Charles W. Robidoux, John Connell, Dorothy Gilfillian, Thomas Green, and Thomas Herrick; and the Sac and Fox Tribe of the Mississippi in Iowa, represented by individual member petitioners, Kenneth Youngbear, Charles Davenport, Percy Bear, and Columbus Keahna. The petitioner tribes as well as the individual member petitioners, on behalf of the Sac and Fox Nation and all its members are entitled under the provisions of the Indian Claims Commission Act to present these claims relative to the title and ownership of those lands as described and set out in Finding 4 (Tr. 3-7).

Subject Matter

3. The lands involved in this proceeding are situated in north central and northeastern Missouri and southeastern Iowa and were a part of that vast territory, which was acquired by the United States from France by virtue of the "Louisiana Purchase" in the treaty concluded on April 30, 1803 (8 Stat. 200), such acquisition being subject to a right of occupancy in favor of the Indian tribes due to their original and previous possession.

4. Petitioners ceded all their right, title, and interests in the lands involved in this proceeding by virtue of *separate* treaties, each [465] concluded on August 4, 1824. Each cession included all of those lands officially designated as Royce 69 and 120, and the total area ceded as set out in "Article 1st" of each treaty reads as follows:

> The ("Sock and Fox tribes . . ." "Ioway . . .") . . . do hereby agree, in consideration of certain sums of money, etc. to be paid to . . . by the Government of the United States, as hereinafter stipulated, to cede and forever quit claim, and do, in behalf of their said tribes or nations, hereby cede, relinquish, and forever quit claim, unto the United States, all right, title, interest, and claim, to the lands . . . within the limits of the state of Missouri, which are situated, lying, and being, between the Mississippi and Missouri rivers, and a line running from the Missouri, at the entrance of Kansas river north one hundred miles to the northwest corner of the state of Missouri and from thence east to the Mississippi . . ." (7 Stat. 229; 7 Stat. 231)

(a) Excepted from those lands ceded under the separate treaties of August 4, 1824 is that portion officially designated as Royce 50, which was ceded under the provisions of the purported treaty of November 3, 1804 between certain members of the petitioner Sac and Fox Nation and the United States, and described generally in so far as pertinent to these proceedings as lying between the Mississippi River on the East, and the Missouri River on the South, and bounded on the west and north by a line running north from a point on the Missouri River at the mouth of the Gasconnade River to a point on the Jefferson River thirty miles from the mouth, thence down the Jefferson River to the Mississippi. (Iowa Pet. Finding 5; Sac and Fox Finding 5; 7 Stat. 84).

(b) Cession 69 lies wholly within the State of Missouri; while Cession 120 is located in the extreme southeastern portion of the State of Iowa and is described in Article 1st of the Treaty of August 4, 1824 concluded with the petitioners Sac and Fox Nation as that land lying between the Des Moines [466] and Mississippi Rivers and south of that line running from the northwest corner of the State of

Missouri east to the Mississippi River. (7 Stat. 229; Eighteenth Annual Report of the Bureau of American Ethnology 1896-1897, Part II "Indian Land Cessions in the United States," Charles G. Royce—My Missouri I, My Iowa I.)

5. The petitioner, Iowa Nation of Indians, seeks to establish a compensable interest in those lands, or a portion thereof, ceded under the Treaty of August 4, 1824 (7 Stat. 231) by showing that said nation held (1) aboriginal Indian title at the time of cession, or (2) a "recognized title" to the area so ceded. (Iowa proposed findings of fact, p. 2, 199)

6. The Commission finds and concludes as a matter of law that the defendant did not recognize or intend to recognize either under the Prairie du Chien Treaty of 1825 (7 Stat. 272), or any other treaty, statute, or agreement, any compensable interest, title, or legal right to the lands, or any portion thereof, in Royce cessions 69 and 120 as described in Finding 4.

7. The petitioner Iowa Nation of Indians limits its present claim based on aboriginal use and occupancy at the time of the treaty of 1824 (7 Stat. 231) to those lands within that portion of Cession 69 lying west of the watershed between the Grand and Chariton Rivers.

(a) Iowas Ex. 183—a map introduced by the petitioners Iowa Nation to "show the situation with respect to exclusive use and ownership of Cession 69 and 120 as of the year 1824" (Iowa proposed Finding 22; see Sac and Fox proposed Finding 17). [467]

(b) Dr. Wallace, petitioners' expert witness, testified that he prepared Iowa Exhibit 183 and that this map represents: ". . . . the territory described in the Treaties of 1824 involving the cession of the Sac and Fox and the Iowa,

however, excluding the territory covered by the Missouri section of Cession 50. The area to the west is colored pink and represents the region predominantly used by the Iowa. The area to the east is colored green and represents the area predominantly used by the Sac and Fox . . ." (Tr. 20 and 21).

8. The Iowa Nation of Indians are classified as of the Siouan linguistic stem of the Chiwere subdivision, which includes the Otoe and Missouri Indians. See:

(a) Indian Tribes of North America—Swanton, p. 267. "Tradition assigns to this tribe a single origin with the Winnebago, Oto and Missouri, and it is borne out by the close linguistic relationship between them."

(b) Iowa Introductory Exhibit I.

"Traditional and linguistic evidence proves that the Iowa sprang from the Winnebago stem, which appears to have been the mother stock of some other of the southwestern Siouan tribes; but the closest affinity of the Iowa is with the Oto and Missouri, the difference in language being merely dialectic."

9. Sometime toward the middle of the eighteenth century the Iowa Tribe or Nation moved southwardly from about the Okoboji Lake region in the northwestern part of Iowa along the Missouri River where they finally settled just south of the present city of Council Bluffs, Iowa. There they remained until about 1765. This location is northwest of the boundaries of Cession 69.

(a) Lewis and Clark reported in 1804 the location of the old Iowa village on the Missouri River as being 30 miles above the entrance to the [468] River Platte (Iowa Ex. 21; Def. Ex. 9).

(b) Auguste Chouteau referring to this period in notes he had written on the Iowa in 1816 states "The Iowas

formerly had their village on the right bank of the Missouri about eighteen miles above the river Platte on the lands of the Mahas."

(c) In the "Iowa Journal of History and Politics 1938," Mildred Mott Wedel stated: "To sum up, then, the Ioway Village was on the east side of the Missouri River about seventeen miles above the mouth of the Mosquito River, and three miles below the present day Indian Creek, just south of a high bluff. This would be just south of the City of Council Bluffs below a bluff that stood out noticeably." (Def. Ex. 5)

(d) Dr. Wallace, petitioners' expert witness, testified as follows:

> "They (Iowa) apparently were under pressure from the Sioux people in this region who surrounded them to the north, to the east and also to the west, and drifted southward along the Missouri River, apparently stopping for a time somewhere in the neighborhood or somewhat north of the Little Sioux River; they moved down to a site, village on the east bank of the Missouri River, a mile or two south of Council Bluffs." (Tr. 21 and 22)

Questioned on the date of the movement to the Council Bluffs area and its relative location to Cessions 69 and 120, Dr. Wallace stated: "Council Bluffs is northwest of Cession 69 and 120. The precise date at which they arrived at Council Bluffs I do not know. It was probably about 1725; somewhere in the early part of the Eighteenth Century." (Tr. 22) He further stated that: "They remained in the Council Bluffs area until about 1765, so they remained in the Council Bluffs area from 1730 to 1765." (Tr. 244)

(e) Dr. Zachary Gussow, who was called as an expert witness by the defendant substantially corroborated Dr. Wallace's testimony on this point [469] when he stated that

the Iowa Tribe started to move slowly out of the Spirit Lake and Lake Okeboji region and started to hunt further south from the northwestern corner of Iowa, around 1700, and by 1721 had moved down to a location near Mosquito Creek, near the Missouri, in approximately the vicinity of Council Bluffs, where they remained until about 1757. (Tr. 296)

10. During a period from about 1755 to 1765 the Iowa Tribe abandoned their village site at Council Bluffs and moved slowly eastward in a body and established their principal village on the Des Moines River approximately 40 leagues up this river near the present site of Selma, Iowa. There they remained until approximately 1812. A second Iowa village was established during this period on the Iowa River and there are reports of two lesser Iowa townsites across the Mississippi River in Illinois, which were abandoned around 1803 or 1804. All of these village locations are outside of Cession 69 and northeast of the area claimed by the Iowa Tribe or Nation in this proceeding.

(a) "An Account of Louisiana"—1803. An abstract of documents in the offices of the Secretaries of State and of the Treasury:

> "Returning to the Mississippi and ascending it from the Missouri, about 75 leagues from the mouth of the latter, the River Moingona, or Riviere de Moine enters the Mississippi on the west side and on it are situated the Ayoas, a nation originally from the Missouri, speaking a language of the Otachatas; it consisted of 200 warriors before the smallpox lately raged among them." (Iowa Ex. 19)

Earlier accounts from Spanish sources take notice of this Iowa Des Moine River location as witness the report of Francis Gouget to de Galvez in 1777. In describing the various Indian sites from the trading post at St. Louis Couget wrote: [470]

> "They (Iowa) are located eighty leagues from this village (St. Louis) by water by the Misisipi river on the shores of the Muen River." (Iowa Ex. 13)

Lewis and Clark wrote in 1805:

> "Their village is 40 leagues up the River du Moin, their country join the Sious lands and extends to the Missouri River . . ." (Def. Ex. 9)

Thomas Andersen, a British trader, reported in 1801-1802:

> "I ascended the Des Moines about fifty miles, to the Ioway tribe of Indians . . . ." (Iowa Ex. 18)

(b) Colonel Auguste Chouteau, who spent many years during the latter part of the 18th and early part of the 19th centuries among the Missouri Indians, and according to William Clark he was partly responsible for the Iowa migration from Council Bluffs to the village sites on the Des Moine in the 1869's,

According to Chouteau:

> "The Iowas formerly had their village on the right bank of the Missouri about eighteen miles above the river Platt on the lands of the Mahas."

He then sets out the extent of country while they were living at the Missouri site:

> "They (Iowa) however pretended to claim that small tract of land upon which necessity had compelled them to settle; but their country was bounded on the north by the dividing ridge that separated the waters of the Grand & Des Moins rivers, east by the *Otos,* south by the Missouri river which separated them from the *Mahas* & west by the *Sioux* their most inveterate enemies. . . ."

and then Chouteau speaks of their leaving the Council Bluffs area:

> "Afraid to hunt on their own lands lest they might be attacked by the Sioux, and constantly threatened by (illegible) *Mahas & Otos* who wishes to drive them from (illegible) *small tract* of country on which they had established (illegible) they determined on a removal to the country of the river des Moins which had long before been abandoned by the Moingonas a band of Sioux who formerly inhabited it. And *for that purpose,* in 1765 they sent a deputation to Mr. de Leclede of St. Louis who then had the exclusive trade of the Missouri requesting to know whether in case of their removal [471] he would send braves among them in the new situation which they proposed to occupy, his answer being favorable about one-half of the Tribe moved in the same year to the country they had designated being about a hundred and fifty miles up the river des Moins, ... the balance of the tribe all removed to the same place in the course of two or three years." (Def. Ex. 12)

Stephen Long in Thwaites "Early Western Travels," Vol. 15, 1819-20, recounts the Iowa leaving the Missouri site as a complete detachment from this area. He states:

> "The Ioways, after having resided in a village on the lower part of the Missouri a considerable space of time, were rejoined by the band above mentioned; when they *abandoned* their position, and returned to the waters of the Mississippi and erected a village on the Moyene, where it still remains." (Iowa Ex. 62)

Governor William Clark, who participated in the treaties of cessions involved in this proceeding, relying upon Chouteau's notes, stated in a letter to the Secretary of War, dated February 20, 1821:

> ". . . . This Tribe (Ioways) had been induced by Col. Chouteau to *abandon their country* near the Council Bluffs on the Missouri and settle on the River de Moin to be more convenient to trade with them."

(c) Dr. Wallace testified to two other Iowa towns, both being in Illinois, one located opposite the mouth of the Iowa River and the other opposite the mouth of the Des Moines. (Tr. 22)

He states further that they were abandoned in the early 1800's and that:

> "The main Iowa village during this period, lets say roughly 1800 was probably on the Des Moines." (Tr. 22)

Morse's "The American Gazetter" from 1798 lists a "Lower Iowa Town" on the east side of the Mississippi River some 61 miles below the mouth of the Iowa River, and an "upper Iowa Town" on the east side of the Mississippi [472] River. (Def. Ex. 16). Pike's report of 1807 indicates the Iowa lived in two villages, one on the "De Moyen" and the other on the "Iowa." (Iowa Ex. 30)

11. Governor Clark sought to remove the Iowa Nation from under the influence of the British during the War of 1812 by directing them to move south and west from their Des Moines River village across to the Missouri River. Some of the tribe made the effort and moved into the Chariton-Grand River area where about 1816 the first Iowa village was reported to be located somewhere on the Grand River. Later in 1823 a permanent Iowa village was built somewhere on the Grand River in which eventually the whole Iowa Nation lived for a period. From about 1812 to 1827, because of the hostilities between Great Britain and the United States and a certain friction among themselves and with the Sac and Fox Indians, the Iowa Nation as a tribal unit became greatly divided, some returned to their old village on the Des Moines River, some moved over to the Missouri River west of Cession 69 and joined up with the Otoes and others scattered themselves about the Chariton-

Grand River area in undetermined numbers and at unknown locations both within and without the area embracing the western portion of Cession 69.

(a) By letter, dated September 12, 1813, Clark outlined his proposal to the Secretary of War to move the Iowas and Sac and Fox tribes from the Mississippi across to the Missouri River in order to prevent them from joining the English. He states therein:

> "I have therefore thought it a correct measure to draw off these tribes from the Mississippi and place them on the Missouri and send the United States factory which formerly supplied them at [473] Fort Madison, up the Missouri to supply them on that River at a point I shall assign for those Indians to remain during the present Indian war."

and further:

> "I have sent also to the Ioways directing them to pass across to the Missouri and a trader will be there to trade with them." (Iowa Ex. 42)

(b) The first reference to an Iowa village on the Grand River is contained in an official report from Governor Clark in 1816. (Def. Ex. 5). Dr. Gussow, defendant's expert witness, commented on this village site with reference to Clark's letter:

> "Some of the Iowa were divided on the question of alliances between the two countries at war, Britain and America . . . . the first documentation I have is about 1816, when the Iowa became divided at this period, and some of the Iowa leave the Des Moines River village . . .
>
> It is at this time when they establish a site on the Grand River, but where on the Grand River I don't know.

> The first reference I have in a letter from Clark, ... this is dated November 4, 1816, ...
>
> The Grand River village is mentioned in a number of documents post dating 1815 or 1816. In none of these documents can I identify the location of that village." (Tr. 316)

Dr. Wallace, on cross examination refers to the same Iowa village on the Grand River in the following manner:

> The village of the Iowa on the Grand River which is being talked about there, was established during the War of 1812 to draw the Sac and Fox and Iowa away from British influence and from contact with pro British Indians in the upper Missouri.
>
> As a consequence, the Iowa left their village on the Des Moine and the Sac and Fox left their village at Rock River and presumably other villages further up came down." (Tr. 170)

Earlier Dr. Wallace in a similar vein stated on direct examination that: [474]

> "During the War of 1812 the Iowa were brought down from their village on the Des Moines and located temporarily in settlements on the Grand River, on the Osage River and on the La Mine River in order to prevent contact with British agents." (Tr. 31)

Dr. Wallace indicated that after the war the bulk of the Iowa went back to their old village on the River des Moines. (Tr. 32)

(c) During the War of 1812, Stephen Long reported that one of the principal Iowa chiefs by the name of "Hard Heart," left the main body of the Iowa Nation at the Des Moine River and moved westward and joined the Otoes across the Missouri. Hard Heart did not approve of the pro-British sentiments of his nation. His defection according to Long resulted in a subsequent westward move-

ment of the rest of his nation ". . . so that the Otoes, Missouries, and Ioways were then united." (Def. Ex. 26) Apparently these followers of Hard Heart returned to their village on the Des Moines River about 1820. (Def. Ex. 5, 26; Sac and Fox Ex. 185.) George Sill by writing from Fort Osage on October 1, 1820 confirms the divided and meandering aspects of the Iowas. He states:

> "This tribe (Iowa) is about as numerous as the Kansas. They are latterly much divided, so that I am unable to state precisely how many villages they occupy, or where they are located. About half the tribe I understand joined the Ottoes, near the Council Bluffs, last year, with the intention of remaining there. I am not sure whether they still remain there or not. The other part of the tribe remains in two villages, I believe, on the Des Moines and Grand Rivers."

Dr. Wallace attributes the Iowa migration to join the Otoes in 1819 as stemming from a dispute with the Sac and Fox. (Tr. 194) This fact seems to be confirmed by a letter written to Secretary of War from Benjamin O'Fallon, Indian Agent, dated September 25, 1819, which reads, in part: [475]

> "A misunderstanding having lately taken place between the Sockees and the Ioways has induced the latter to abandon their original residence (on the Domoin and Mississippi) and locate themselves on this river; they are now living with the Ottres and Missouris who were all once one nation." (Iowas Ex. 61)

Thomas Forsyth, reporting on the Indians within his agency, stated on May 12, 1822:

> "The Ihowais have hereofore been a lost sheep, living in two or three different villages, and the principal chiefs with some few fcllowers living with the Ottos whose language is similar to that of the Ihowais. I sent last fall a talk to the Ihowais advising the whole

> of that nation to live together in one village up the River de Moine." (Iowa Ex. 78)

(d) According to Forsyth the Iowa established a new village somewhere on the Grand River in 1823, in which the whole Nation was located. He states in his letter of July 7, 1823:

> "I have been informed that the Ihowai Indians formerly residing during the summer months on River de Moine have all removed and built a new village on the Grand River which falls into the Missouri River some distance above Chariton." (Iowa Ex. 84)

Dr. Wallace spotlights the existence of the Iowa Grand River village on his map introduced as Exhibit 183:

> "Well, as we have said many times, this village which is symbolized by that red dot was built in 1823, and at that time according to Forsythe, it *held all or almost all* of the Iowa tribe, which would be at the top limit a thousand or probably I would say of Iowa who did not live there. But it would be the main village at that time."

Thomas Forsyth confirmed the fact of the Iowa withdrawal from the Des Moines River site to the Grand River village since they were now outside of his agency in 1824. (Iowa Ex. 91)

According to Dr. Wallace the Iowa Nation remained at their Grand River village for four years until 1827 and then moved over to Little Platte River west of Cession 69 in 1827. (Tr. 57) [476]

12. As the frequency of white contact with the Indians increased in this area, the activity of the Indian trader assumed a more important role in the red man's economy. Hunting for the fur bearing animal, while satisfying the immediate wants, nevertheless provided the necessary means of exchange for Indians to trade for the white man's goods.

(a) Dr. Wallace summed up the importance of hunting to the Indian of this day in the following manner:

> "Hunting would be extremely important to an Indian tribe, not merely for the sake of the value of the meat which a hunter could get for himself and his family or for the skins and furs, and bone, which they could use for making articles of clothing and other valuables, but particularly because it gave them furs and pelts which could be traded to Europeans for hardware and dry goods which were regarded by the Indians as essential elements of their standard of living at this stage. So that the Indian currency system if we can put in this phrase was made up of skins and furs." (Tr. 42, 44)

Dr. Wallace also testified that with the increase of Indian trading activity the production of agricultural products declined. (Tr. 154-156) According to Dr. Wallace, Indian agricultural activity centered about growing ". . . large quantities of corn, beans, squashes, those things in several varieties."

(b) Dr. Gussow, in his report (Def. Ex. 114) confirmed the importance of hunting to the Iowa Indians after the coming of the whites. He states the following in his opening paragraph under sub-title "Iowa Hunting Grounds":

> 'The Iowa lived a semi-nomadic life, hunting for subsistence, for reasons of economic exchange with European traders, and augmenting their diet by planting small quantities of corn, beans, squash, and other crops. It is no exaggeration to state that with the coming of the Europeans, hunting for exchange became the dominant economic activity of the Iowa, as with other Indians. The Iowa not only spent more time in hunting for exchange than in any other economic activity, but their way of life was to become dependent upon European articles of manufacture [477] to the point where a failure to obtain trade goods could mean starvation.'

13. Delimitation of Iowa hunting grounds can be made only in general terms. Documentation is practically nil. Such questions, as intensity and frequency of use of a given area and the relative size of an Iowa hunting party are strictly matters of inference or even mere conjecture. At the time the Iowa Nation was located at its village site near the present town of Council Bluffs up until approximately 1765, the Iowas hunted close to the Missouri River area, ranging eastward to the Des Moines and southwardly to the Nisnabotna River, but the area primarily lies within what is now southwestern Iowa, being generally north and west of Cession 69. After the Iowa Nation moved eastward (circa 1765) to their Des Moines River village site they continued to hunt westward then to the southwestern part of Iowa to the Missouri River in the general region of the headwaters of the Grand and Chariton Rivers, and dipping into the northwestern portion of Cession 69.

(a) Dr. Wallace's testimony in reference to the Iowa hunting area, circa 1765, reflects the difficulty in delimiting the area. He states:

> "By the time they reached Council Bluffs, still under pressure from the Sioux, their hunting *probably* . . . and this again is *inference* . . . was southward along the Missouri and eastward towards the Des Moines.
>
> "I would think that by . . . well, from 1765 they *probably* were making use of the territory south of Council Bluffs and in the general region south of the Des Moines and between these two points (?) of the Missouri river, which would include the pink area, Cession 69 and 120, although this as their hunting ground, isn't specifically delineated." (Tr. 24)

Dr. Gussow in his report on the Iowa hunting grounds during this period states: [478]

> "The Iowa must have hunted in what is now western Iowa, east to the Des Moines, south to the Nishnabotna,

> and northward at least to the Boyer and perhaps to the little Sioux River." (Def. Ex. 114, p. 19)

Dr. Gussow cites Chouteau's notes as outlining the Iowa territory in 1760, and he concludes that the entire area lies outside of Cession 69.

(b) In his notes written in 1816, Auguste Chouteau, referring to the period, circa 1760, attempted to delineate the hunting areas or territory claimed by the various tribes in this region. Besides the Iowas, he noted the Otos, Missouri, Sioux and Kansas, among others. His outline of the Iowa's claim to the lands in this area has previously been set out in Finding 10(b).

(c) After moving to their Des Moines River site in about 1765, the Iowas continued to hunt westward to the Missouri River. Thomas Anderson, an Indian trader, who spent the years 1801-1802 with this tribe, stated in his report:

> "I ascended the Des Moines about fifty miles, to the Ioway tribe of Indians . . . These Indians hunted near the Missouri, about ninety miles across the country where we were located." (Iowa Ex. 18)

In his report in 1807, Pike reported "The Iowas reside on the river De Moyen, and westward to the Missouri." (Iowa Ex. 30) Stephen Long noted in recalling his early travels "The Sauks, Foxes, and Ioways, hunt in the plains toward the sources of Grand River, where elk and deer are still numerous, and the latter dispose of their 'pelfries' to traders on the Missouri." (Iowa Ex. 63) Lewis and Clark reporting on their expedition in 1805 place the Iowa country next to the Sioux: [479]

> "Their (Iowa) village is 40 leagues up the River Deemoen, their country join the Soues Lands and extend to the Missouri River .... They are descendants of the ancient Missouris, and claim the country west

> of them to the Missouri; but as to its precise limits, or boundaries, between themselves and the Saukees and Foxes, I could never learn."

(d) After the War of 1812, when the Iowas for the most part, had moved generally from their Des Moines River site to locations on the Grand River and across to the Platte River, Agent Sibley, who was stationed at Fort Osage, reported in 1819 to Governor Clark that he believed the Iowas had as just a claim to the lands northwest of the Missouri as did the Osage who had ceded all their interests to the lands north of the Missouri River in the 1808 treaty with the United States. His report states, in part:

> "I confess myself an advocate for the Ioways in this matter . . . The claims of our Indian Tribes to lands are so extremely vague and undefined, so conflicting and intermixed, that I cannot conceive a much more difficult task, than to assign to each tribe its proper limits . . . Therefore I think it would much better comport with the liberal views and benevolent policy of our Government toward these poor creatures, to satisfy them all by annuities, in proportion to their numbers, for such lands we desire to add to our domain, used as the hunting grounds of any Trib[illegible] or Tribes."

and further, indicating use of the same area by neighboring tribes,

> "Perhaps, it would be just to say, that the forests and wilds of Missouri belong in common to those Nations of Indians who lived contiguous to them, and hunt thru them. And that when our Government thinks proper to reclaim those wilds for the use of one People, renumeration ought to be made in common to those tribes whose natural pursuits are thus interfered with." (Iowa Ex. 57)

In a subsequent report dated October 1, 1820, Sibley stated in reference to the Iowa hunting grounds: [480]

> "The Ioways hunt principally between the Missouri north of it, and the Mississippi river, from the heads of the two Chacatons (Chariton), up to the Nodoway and sometimes further up."

(e) Dr. Wallace, petitioners' expert, is of the opinion that the Iowa traditional hunting grounds to which the Iowas claimed "exclusive" control from 1800 to 1824 were bounded by a line

> "running up from the Missouri River along the watershed between . . . the Grand and Chariton Rivers, to a point on the Des Moines and possibly across the Des Moines for some small distance, then turning up the Des Moines and westward to meet a line which I believe I referred to in earlier testimony between the Nottoway and Nishnebottonna Rivers which flow southward into Missouri through the Platte Purchase." (Tr. 153)

In reference to the permanency and location of the Iowa hunting villages or camps, Dr. Wallace confessed lack of knowledge and consequently he was unable to determine how frequently the Iowas returned to their hunting spots. (Tr. 134, 158)

(f) Dr. Gussow states in his report that after the Iowa had located themselves at the Des Moines River site,

> ". . . the Iowa hunted in the Des Moines valley, probably ranging as far as Farebault's trading post two hundred miles up river, southwest into cession 69 towards the headwaters of the Grand and Chariton rivers, and beyond, west to the Nishnabotna." (Def. Ex. 114, p. 20)

He states further that after 1810 and presumably until the treaty of cession in 1824,

> "The Iowa continued to hunt in the plains toward the sources of the Grand river and in the western part of

Cession 69, but largely for secondary animals, elk and deer."

14. From about 1700 to 1824, the population of the entire Iowa Nation averaged approximately 1,000 persons. (Iowa Proposed Finding 30) [481]

15. The Commission finds from all the evidence that the petitioner Iowa Nation of Indians and the petitioner members thereof, are the successors in interest to the Iowa Tribe or Nation which ceded under the Treaty of August 4, 1824 (7 Stat. 231) all its interest to those lands described in Finding 4; and the Commission finds further that at the time the defendant acquired title to the aforesaid lands by purchase from France in 1803 until the Treaty of 1824, the Iowa Tribe or Nation held original Indian title to those lands described within the following boundaries:

"Commencing on the present Missouri-Iowa line at a point which under the call in the Treaty of 1824 formed the 'northwest corner of the state of Missouri' due east along said line to the northwest corner of Putnam county, Missouri; thence due south following the western line of Putnam county and the western line of adjoining Sullivan county, Missouri to the southwest corner of Sullivan county; thence on a line due west to the southwest corner of Gentry county Missouri; thence due north along the western line of Gentry county to the place of beginning."

Sac and Fox Claim

16. The petitioner, Sac and Fox Nation seeks to establish a compensable interest in those lands or a portion thereof ceded under the Treaty of August 4, 1824 (7 Stat. 229) by showing that said Nation held (1) aboriginal Indian title at the time of cession, or (2) a "recognized title" to the area so ceded. (Sac and Fox Proposed Finding of Fact, p. 2)

17. The Commission finds and concludes as a matter of law that the defendant did not recognize or intend to recognize either under the Treaty of 1804 (7 Stat. 84), or any other treaty, statute or agreement, any compensable interest, title or legal right to the lands, or [482] any portion thereof, in Royce Cessions 69 and 120, as described in Finding No. 4.

18. The petitioner, Sac and Fox Nation limits its present claim founded upon aboriginal use and occupancy at the time of the Treaty of 1824 (7 Stat. 239 [229]) to those lands within Cession 120 and that portion of Cession 69 which lies east of the watershed between the Grand and Chariton Rivers. (Sac and Fox proposed Finding 17; see Commission's Finding 5).

19. Around the middle of the eighteenth century, the individual Sac and Fox tribes of Indians became closely allied due to their mutual difficulties with the French. They subsequently began to move as a body southwestward from the State of Wisconsin toward the Mississippi River where they finally settled in individual village sites along and on both sides of the Mississippi. These separate Sac and Fox villages remain fairly consistent during the years that followed up to the Treaty of 1824 (7 Stat. 239 [229]). These villages range along the Mississippi River area as far north as the Turkey River and Prairie du Chien region, and as far south as the mouth of the Des Moines River. Generally the Fox Tribe occupied the upper villages and the Sac Tribes the lower village sites. The small Sac village at the mouth of the Des Moines River was the only village of consequence that lay within the ceded area, it being located in Cession 120.

(a) Dr. Gussow, defendant's expert witness, states in his report that the Sac and Fox established a village some

place on the Rock River about 1760. (Def. Ex. 114, p. 28) Auguste Chouteau in his notes [483] written in 1816 refers to a similar occurrence when he states that the Allied Sac and Fox Tribes, " . . . left their village on the Ouisconsin, gradually descended the Mississippi and in 1764 settled on Rock River."; and he states further:

> "The Foxes, or rather a band of them, also removed, in the same time, to a place called Spanish Mines (Dubuque's) and no other tribe having opposed them they have for a long time continued in uninterrupted possession of that tract of country. . . ." (Def. Ex. 12)

Francisco Cruzat reported in 1780 that the Sac Nation was on the Mississippi, "forty leagues" from St. Louis (Sac and Fox Ex. 5). A later report made in 1797 by Howard states that the Sac and Fox ". . . have three villages in the vicinity of River Ana Indes (the Des Moines) . . . ." (Sac and Fox Ex. 14)

(b) in 1804 Amos Stoddard wrote to Governor Dearborn concerning the Sac Tribes;

> "I believe an opinion has generally prevailed that the Sacks mostly resided on the East side of the Mississippi whereas the contrary appears to be the fact. A trader who has resided among them for upward of 20 years lately informed me that he now resides among them on the west side of that river . . . ." (Sac and Fox Ex. 19)

In a subsequent letter to Dearborn also written in 1804, Stoddard had this to say:

> "How far the whites have encroached on them I cannot learn—nor am I informed how far the claim of the Saucks and Reynards extend down the Mississippi. One thing is certain their claim extends back to the Missouri where some of the whites have settled. They conquered the lands on the Missouri from the little Osages. . . .

> I believe an opinion has generally prevailed that the Sauks and Reynards mostly live on the East side of the Mississippi. This indeed was formerly the case .... but they now mostly inhabit a large island formed by a lake on the west side of that river just above the mouth of the De Moine, only 258 miles above this (St. Louis)" (Sac and Fox Ex. 20). [484]

In 1804 the Sac and Fox Nation ceded all its right, title and interest to those lands described in Royce Cession 50 by the purported Treaty of November 3, 1804. (7 Stat. 84) See Commission's Finding No. 4(a). The ceded area apparently includes the territory referred to by Stoddard.

(c) On August 9, 1805 Zebulon Pike departed from St. Louis to begin his expedition up the Mississippi River. On August 20, 1805 he arrived at the foot of the rapids de Moyen which extend some eleven miles to the Sac village. Pike encampted opposite this village and on the following day addressed the chiefmen of the village. (Sac and Fox Ex. 29) This village at the confluence of the Des Moines and Mississippi Rivers is in Cession 120. In 1810 the report was published as an "Ethnography of the Mississippi" in which Pike set out in detail the locations of the various Sac and Fox villages he had encountered. It reads in part:

> "The first nations of Indians whom we met with in ascending the Mississippi from St. Louis were the Sauks who principally reside in four villages . . . The *first* at the head of the De Moyen on the W. shore consisting of 13 log lodges (at Montresse, Lee County, Iowa); the *second* on a prairie on the E. shore about 60 miles above; the third on the Riviere de Roche, about three miles from the entrance (Milan, Rock Island County, Illinois), and the *fourth* on the river Iowa.
>
> .....
>
> The Reynards reside in three villages—The *first* is on the W. side of the Mississippi, six miles above the rapids of River de Roche (Rock River—Le Claire, Scott County, Iowa); the *second* is about 12 miles in the rear

> of the lead mines (Dubuque, Iowa); and the *third* is on Turkey river half a league from its entrance. (Sac and Fox Exs. 135, 136) [485]

(d) On February 19, 1806, President Jefferson sent to Congress a statistical report prepared by Captain Merriwether Lewis relative to the Indian tribes of the Louisiana Territory. Lewis places the Sac Indians at 2,000 souls, living "on the west side of the Mississippi, 140 leagues above St. Louis"; he remarks that the Sac and Fox Indians

> "are so perfectly consolidated, that they may in fact be considered as one nation only; they speak the same language; they formerly resided on the east side of the Mississippi.";

Lewis numbers the Fox Tribe at 1200 souls located in one village near the Sacs. (Sac and Fox Ex. 30) Other references to the Des Moine River village are: Dearborn, April 10, 1806, "(Sac villages) at the Rapids of the Mississippi above the mouth of the River De Moin." (Sac and Fox Ex. 31); Governor Lewis, July 1, 1808,

> ". . . . immediately after the delivery of these horses they (Sacs) returned from their village at the rapid demoin, situated on the S. west bank of the Mississippi 15 miles above the entrance of the river De Moin . . . if . . . the Saucs return to their old village . . . that it will be best to establish a factory at the rapid demoin on the S. West side of the Mississippi near their village . . ." (Sac and Fox Ex. 36)

and Indian Agent Johnson's report to Governor Clark, July 25, 1813;

> ". . . The Sac Nation has seven hundred men, six hundred of them live at the mouth of the river De Moin friendly disposed . . . Fox nation four hundred men, two hundred fifty live at the mouth of Demoin River, one hundred near Prairie du Chien, fifty at their lead mines on the Mississippi." (Sac and Fox Ex. 38)

(e) Dr. Gussow in his report in reference to the Sac Des Moine River village comments as follows:

> "Of these settlements the Des Moines river site was the only one within cession 120. The Des Moines site was also one of the smallest of all the Sac villages. [486] Pike mentions 13 lodges. Forsyth in letters written in 1819 and 1820 refers to the Des Moines site as a 'small' village, . . . The Des Moines site was abandoned in 1821 when the inhabitants moved to the mouth of the Iowa river, but was resettled a year later by a few families (who are related to a half blood [trader] named Blondeau). These latter families were still there, according to Forsyth, in 1824. The main body of the Sac numbering 800-1000 warriors, continued to live, during this period, at the large Rock River settlement." (Def. Ex. 114, pp. 31, 32)

According to Gussow there were never any Fox villages in Cession 69, but nevertheless, "The general history of the Fox Indians, their migrations, hunting grounds, wars and alliances after 1733 were closely linked with those of the Sac." (ibid p. 32)

20. During the War of 1812, portions of the Sac and Fox Nation who claimed some allegiance to the United States moved down from their Mississippi River sites and were found at various locations on the Salt, Missouri, Osage and Chariton Rivers on lands within Cession 69.

(a) John Campbell reported to Governor Clark on March 10, 1812:

> ". . . . I have an interview with some of the Sac Indians who claim protection from the Americans. I told them I had no instructions to protect them.
>
> The chief informed me that there were a number of his nation on the Mississippi above the Salt River and that they were all friendly toward the whites." (Tr. 370, 371)

According to Dr. Gussow these Indians came down to the Fort Mason area to escape those persons who were pro British. (Tr. 371)

(b) As reported in the journal of Jules de Mun, members of the Sac Tribe were on the Osage River committing depredations against the Osage Indians and the white settlement at the mouth of the Osage River: [487]

> "There were Sacs belonging to the village which has been established in the last three years, by permission of the government, on the Osage River, and who under the appearance of peace, commit all sorts of depredations which they pretend are attributable to the Sacs of Mississippi." (Tr. 373; Def. Ex. 36)

(c) Thomas Forsyth reported to Governor Clark on March 24, 1820:

> "It would appear that Sac and Fox Indians had a camp near a white settlement located on the Missouri River below the mouth of Grand River—This or the Boone's lick Settlement." (Sac and Fox Ex. 65)

21. Having established their village sites along the Mississippi River in 1760, the Sac and Fox proceeded to hunt the area on both sides of the river from as high up as Prairie du Chien and the Wisconsin River to as far south as the mouth of the Illinois River. The Sac hunting grounds east of the Mississippi River below the Des Moines River to the Missouri lay principally in Cession 50 and the northeastern part of Cession 69. After 1810, since the quantity of game and fur-bearing animals had greatly diminished in eastern Iowa and Missouri, the Sac and Fox were compelled to extend their hunting trips toward the headwaters of the Iowa and Des Moines River, and toward the headwaters of the Grand and Chariton Rivers across to the Missouri River. As a result many of the Sac and Fox gave up extended hunting trips because of the distance

involved and concentrated upon the lead mining activity in Dubuque, Iowa region. After 1812 Sac and Fox excursions southward to the Missouri for the most part consisted of raiding parties bent on committing depredations upon both the white and Indian settlements in the area.

(a) As early as 1795 the Sacs were reported to be hunting in as far down the Mississippi as the Missouri River. Trudeau reported in [488] 1795 that: "The Sacs, who are very numerous, hunting on the Missouri, killed ten or twelve Osages . . ." (Sac and Fox Ex. 10)

(b) Dr. Gussow states that during the latter part of the eighteenth century the Spanish trading policy was to encourage the neighboring Indian Tribes to come to St. Louis to trade with the Spanish. Such tribes as the Osage, Iowa, Kickapoo, Mascoutins, Potawatomi, Ottawa, Sac and Fox regularly made trips to St. Louis (Def. Ex. 114, p. 39) According to Thomas Hutchins in 1776, the Spanish traders,

> ". . . have drawn all the Indian trade of the Missouri, part of that of the Mississippi (northwards) and of the tribes of the Indians residing near the Quisconsing and Illinois rivers to this village (St. Louis) . . ." (Def. Ex. 82)

(c) The Sac and Fox and Osage Indians during this period and into the early 1800's were intermittently engaged in tribal warfare with each other throughout the entire area embraced in the southeastern portion of Cession 69 and in Cession 50 at the confluence of the Missouri and Mississippi Rivers. (Def. Ex. 114; see "Black Hawk's" biography, Def. Exs. 63, 71, 105)

After the United States acquired this area in 1803, Lewis and Clark explored the Louisiana Territory beginning in 1804. As to the Sac and Fox hunting grounds Lewis reported:

> ". . . . they sometimes hunt in the country west of them towards the Missouri, but their *principal* hunting is on *both* sides of the Mississippi, from the mouth of the Ouisconsin to the mouth of the Illinois River." (Sac and Fox Ex. 20)

Amos Stoddard reported to Governor Dearborn on June 22, 1804: [489]

> '. . . . How far the whites have encroached on them I cannot learn—nor am I informed how far the claims of the Sauks and Reynards extend down the Mississippi. One thing is certain their claim extends back to the Missouri where some of the whites have settled. They have conquered the lands on the Missouri from the Little Osages." (Sac and Fox Ex. 20)

Zebulon Pike reporting on his expedition to the headwaters of the Mississippi in 1805-1807 had this to say about the Sac hunting grounds:

> "They hunt on the Mississippi and its confluent streams, from the Illinois to the river des Iowa and on the plains west of them, which border the Missouri. They have for many years past made war on the Santeaux, Osages and Missouris. . . .";

and as to the Fox hunting grounds he states:

> ". . . They hunt on both sides of the Mississippi from the river Iowa below Prairie due Chiens to a river of that name (Upper Iowa river), above said village." (Def. Ex. 18)

(d) In his biography written about 1833, Black Hawk, the legendary warrior chief of the Sac speaks of the "Two River" country as their deer hunting country which area was on the north boundary of Cession 50 in Cession 69. He states that the Sac Rock River village

> "had stood for more than a hundred years, during all of which time we were the undisputed possessors

> of the valley of the Mississippi, from the Ouisconsin to the Portage des Sioux near the mouth of the Missouri, being about seven hundred miles in length. . . ." (Def. Ex. 63)

When the construction of Fort Mason was being considered by the United States during the War of 1812, Black Hawk felt that ". . . . I did not want a fort in our country, as we wished to go down to the Two River country in the fall and hunt, it being our choice hunting ground, and we concluded that if this fort was built it would prevent us from going [490] there. . . ." (Def. Ex. 63) Dr. Gussow seems to agree with Black Hawk in reference to Sac hunting grounds: "More particularly, it was the lower Mississippi Sac villages who hunted toward the Missouri in the eastern part of Cession 69 up until this time." (Def. Ex. 114, p. 56)

(e) As the Sac and Fox hunting grounds became depleted along the Mississippi about 1810, they turned their attention to working the lead mine at Dubuque, Iowa. John Bradbury wrote circa 1810:

> "These lead mines are of great value to the Saukee and Fox nations. As the game on the lands which they claim is nearly destroyed, they have therefore been compelled to commence the business of mining or rather digging, but the operation of smelting is done by the squaws." (Def. Ex. 71)

And Nicholas Boilvin, an Indian agent, wrote on February 2, 1811:

> "The Sacs, Foxes, and Iowas can be as well supplied at the latter place as the former particularly as they have mostly abandoned the chase, except to furnish themselves with meat, and turned their attention to the manufacture of lead, which they procure from a mine about sixty miles below Prairie des Chiens. During the last season they manufactured 400,000 pounds of that article, which they exchanged for goods." (Def. Ex. 20)

Thomas Forsyth, in 1821, confirmed the scarcity of game along the Mississippi River and necessity of the Sac and Fox Indians to work the lead mines, "for means to feed their families during the summer months," and further "indeed I cannot see how the major part of the Foxes and some of the Sauks could exist without those mines. . . ."

(f) Coupled with the depletion in game and the encroachment of the whites from the east after the War of 1812, the Sac and Fox moved further west and northwest across Missouri for new hunting grounds [491] while at the same time committing depredations against the white settlements along the Missouri River. August Chouteau, in his notes of 1816 refers to Indian hunting activity within Cession 69 and states:

> "The Sacks, Foxes, Iowas and some other Mississippi Tribes have of late years been in the habit of hunting there but that alone cannot give them a right. . . ." (Def. Ex. 12)

By letter dated June 23, 1850 [1820], Clark noted that the Sac and Fox were commencing a war against the other Missouri tribes which were located for the most part either on the south or west sides of the Missouri River. (Def. Ex. 75, 114) Stephen Long reported in 1820: "The Sauks, Foxes, and Ioways, hunt on the plains toward the sources of Grand River. . . ." (Iowa Ex. 63; Def. Ex. 26) Long also reported that war parties of the Sac and Fox were west of the Missouri River raiding the villages of the Omahas. (Def. Ex. 26) In 1823 Forsyth reported that Sac Indians were hunting on the Kansas River. All of these reports place the Sac and Fox west and north of Cession 69.

As to depredations committed by Sac and Fox in white settlements during the War of 1812, J. L. Thomas, a historian, states:

"Black Hawk and his faction of the Sac and Foxes . . . began hostilities against Boone's Lick Settlement before the war between the United States and England was declared. June 18, 1812 Congress declared a state of war existed between the two countries and from then to March 24, 1815, a predatory Indian war upon the settlements north of the Missouri was kept up . . . ." (Def. Ex. 55)

22. The population of the combined Sac and Fox Tribes from earliest times is difficult to estimate but at the time of the Treaty of August 24 [4], 1824 approximated 4,400 to 6,500 souls. [492]

(a) In 1806 Merriweather Lewis estimates the Sacs at 2,000 souls and the Foxes 1,200. (Sac and Fox Ex. 30)

(b) Forsyth on May 2, 1821 puts the combined Sac and Fox at 5,600 souls. (Sac and Fox Ex. 71)

(c) Dr. Wallace testified: "From information supplied by Forsyth in 1824, the population of the Sac and Fox is given as 6,400 persons . . . ." (Tr. 62)

23. The Commission finds from all the evidence that the petitioner Sac and Fox Nation, and the petitioner members thereof, are the successors in interest to the Sac and Fox Indians who ceded by the Treaty of August 24 [4], 1824 (7 Stat. 239 [229]) all their right, title and interest to those lands as described in Finding 4; and the Commission further finds that at the time the defendant acquired title to the aforesaid lands by purchase from France in 1803 and until the Treaty of 1824, the Sac and Fox Nation held aboriginal Indian title to those lands described within the following boundaries:

"Commencing at a point corresponding to the northwest corner of that cession known as Royce 50 and proceeding north on that line which would form an extension of the western boundary line of Royce 50

to that point where such extension intersects the Missouri-Iowa line; thence east along said line to its intersection with the Des Moines River; thence following along the south bank of the Des Moines River to its confluence with the Mississippi river, thence down the west bank of the Mississippi to a point corresponding to the northeast corner of said Royce 50; thence west along the northern boundary line of Royce 50 to the place of beginning.

The "Half-Breed" Tract

24. The Commission finds that by the Treaty of August 24 [4], 1824 (7 Stat. 239 [229]), Congress intended and did so recognize and confer upon [493] the Sac and Fox for the benefit of their half breeds a reservation title to those lands lying within and officially described as Royce Cession 120. By the Act of Congress of June 30, 1834 (4 Stat. 740), the United States relinquished its reversionary interest in the reservation to the Sac and Fox half breeds.

(a) In the second paragraph of "Article 1st" of the Treaty of August 24 [4], 1824 (7 Stat. 239 [229]), the United States from the lands ceded thereunder, reserved a tract of land to the Sac and Fox for the benefit of their half breeds. Said paragraph reads as follows:

> "It being understood, that the small tract of land lying between the rivers Desmoin and the Mississippi, and the section of the above line between the Mississippi and the Desmoin, is intended for the use of the half breeds belonging to the Sack and Fox nations; *they holding it, however, by the same title, and in the same manner, that other Indian titles are held.*"

(b) That Congress intended to create a reservation is amply demonstrated by its subsequent act of relinquishing its reversionary interest in said reservation back to the Sac and Fox half breeds, by the Act of June 30, 1834 (4 Stat. 740):

"An Act to relinquish the reversionary interest of the United States in a certain Indian reservation lying between the rivers Mississippi and Desmoins.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all the right, title, and interest which might accrue or revert to the United States to the reservation of land, lying between the rivers Desmoins and Mississippi, which was reserved for the use of the half-breeds belonging to the Sacs and Fox nations, now used by them, or some of them, under a treaty made and concluded between the United States and the Sacs and Fox tribes or nations of Indians, at Washington, on the fourth day of August, in the year one thousand and eight hundred and twenty-four, be, and the same are hereby relinquished and vested in the said half-breeds of the Sacs [494] and Fox tribes or nations of Indians, who, at the passage of this act are, under the reservation in the said treaty, entitled, by the Indian title, to the same; with full power and authority to transfer their portions thereof, by sale devise or descent, according to the laws of the state of Missouri.

Approved June 30, 1834."

s/ Edgar E. Witt
Chief Commissioner

s/ Louis J. O'Marr
Associate Commissioner

s/ Wm. M. Holt
Associate Commissioner [495]

BEFORE THE INDIAN CLAIMS COMMISSION

(Caption is same as precedes findings)
(Decided July 2, 1958; 6 Ind Cls Comm 464)

OPINION OF THE COMMISSION

Witt, Chief Commissioner, delivered the opinion of the Commission.

The petitioner, the Iowa Tribe or Nation of Indians and the member petitioners thereof, and the petitioner, the Sac and Fox Nation and the member petitioners thereof, seek additional compensation for their interests in those lands which each petitioner ceded to the defendant [496], United States, under separate but substantially identical treaties. Both treaties were concluded on August 4, 1824 in the City of Washington, D. C., and under each treaty the defendant took a cession with one exception of all the right, title, and interest of the respective petitioners to the same lands located in north central and northeastern Missouri. (7 Stat. 229, 231) Officially these lands are designated Royce 69 and 120, a more complete description of which is set out in Commission's Finding 4.

The exception referred to above is found in that treaty concluded with the Sac and Fox Nation (7 Stat. 229), whereby the United States reserved to the Sac and Fox Nation for the use and benefit of the Sac and Fox half-breeds the entire area included within Cession 120. This relatively small area is generally referred to as the "Half-breed" tract, and will be discussed in more detail in disposing of the petitioner Sac and Fox claims.

Of prime concern at this stage of the hearing are the respective claims of the petitioners that each had perfected aboriginal Indian title and/or recognized title to all the lands involved herein, or at least to defined portions thereof. The capacity of each of the petitioner claimants is

also in issue. The Commission looks upon the petition filed herein as one stating separate and distinct claims, since the petitioner's predecessors ceded their lands under separate treaties, and each petitioner has chosen to establish its title to separate portions thereof.

We shall first consider the claims of recognized title, noting that each petitioner bases his claim on a different theory. [497]

Prior decisions of the courts and this Commission have established the principle that Congress is the sole source of "recognized" or reservation title, so that when Congress acts whether by treaty, statute or agreement, it accords legal rights to those Indians who previously held their lands under permissive occupation. (*Tee-Hit-Ton Indians of Alaska* v. *United States,* 348 U.S. 272; *Hynes* v. *Grimes Packing Company,* 337 U.S. 86; *The Miami Tribe, et al.* v. *United States,* 5 Ind. Cls. Comm. 180)

Since recognized or reservation title is a legislative product, the answer to the present question calls for a legal determination as contrasted with proof of aboriginal title which involves primarily a question of fact. In any event, should petitioners' claims of recognition prevail, it would dispose of the present controversy over title and dispense with the question of aboriginal use and occupancy.

The Commission has thoroughly considered the respective claims of recognized title as ably presented by the Iowa and Sac and Fox petitioners, and finds them to be without merit.

Briefly, the petitioner Iowa argues that by virtue of certain language in the Prairie du Chien Treaty of 1825 (7 Stat. 272) in which the Sac and Fox Indians agreed that the "Ioways" would "have a just claim to a portion of the country between the boundary line, described in the next

preceding article, and the Missouri and Mississippi. . . ." and ". . . . the United States agree to and recognize the preceding boundaries . . . .", the United States recognized title to be jointly in the Sac and Fox and Iowa Indians to the entire area [498] lying south of the "Sioux and Sac and Fox" line between the Missouri and Mississippi Rivers, which includes the area designated as Cession 69.

This argument, of course, ignores the plain fact that the Iowa petitioner had already ceded any interest it had in Cession 69 one year before the Prairie du Chien Treaty, and that the stated purpose of the Prairie du Chien Treaty of 1825 called for the establishment of distinct tribal boundaries upon unceded Indian lands. In this connection the two treaty Commissioners, Lewis Cass and William Clark, in a letter to the Secretary of War, dated September 1, 1825, stated:

> "We had nothing to ask of them . . . . neither the confirmation of old or the grant of new cessions. . . ." (Sac and Fox Ex. 104)

Of interest in connection with the Prairie du Chien Treaty of 1825 is an excerpt from the records of the Bureau of Indian Affairs dated January 9, 1837, which indicates that the Government viewed the joint Iowa-Sac and Fox claim under the 3rd Article of the treaty extended southward between the Missouri and Mississippi Rivers to the Missouri state line which coincides with the north boundary line of Cession 69.

This excerpt reads in part:

> "The Sac and Fox are one nation and jointly with the Ioways, claim an interest in the lands north of the State of Missouri. . . . The claim of the Ioways to a portion of this tract was admitted by the Sacs and Foxes in the 3rd Article of the treaty with them and other tribes of the 19th of August 1825. . . ." (Iowa Ex. 127)

Later, in 1842, T. Hartley Crawford, Commissioner of Indian Affairs, stated unequivocally in discussing the Prairie du Chien Treaty of 1825. [499]

> "This treaty attached ownership of the Sacs and Foxes and Ioways to all the land south of the line fixed by the treaty of 1825 between the Sioux and Sacs and Foxes, *North of the Northern boundary of the State of Missouri as that line then existed,* and between the Mississippi and Missouri rivers." (Underscoring supplied) (Sac and Fox Ex. 121)

Also of interest is a letter of April 12, 1834 from Andre Hughes to Lewis Cass in which he states:

> "The Ioways, Sacs and Foxes of the Missouri river desire to cede to the United States a large tract of land lying west of the river Desmoines and north of and adjoining the State of Missouri. . . ." (Iowa Ex. 119)

In order to sustain the petitioner's Iowa claim of recognition it is necessary to declare null and void the Iowa Treaty of 1824, and thus effectively erase the boundary line describing the ceded area therein. This we are not disposed to do in the absence of strong definitive language in the Prairie du Chien Treaty, or any other treaty or statute, which would point us in that direction. In fact the Prairie du Chien Treaty of 1825 makes no mention or reference to the Iowa Treaty of 1824.

The petitioner Sac and Fox Nation seeks to impress a reservation title upon the ceded lands involved in this proceeding by virtue of the language contained in the opening statement in Article 2 of the Sac and Fox Treaty of 1804 (7 Stat. 84) which reads:

> "The general boundary line between the lands of the said Indian tribes (Sac and Fox) shall be as follows: . . . ."

There then follows a description setting out the boundaries of the ceded area. The petitioner Sac and Fox alleges that by implication this language constitutes a recognition by the United States that title [500] to the unlimited area lying outside and adjacent to the ceded portion rests in the Sac and Fox Nation.

Generally speaking, we know that the setting of boundary lines in a treaty of cession is somewhat arbitrary. The Government's main concern in establishing these lines is to be doubly sure that every conceivable claim asserted by the Indians, regardless of merit, is included within the ceded area; so that it is quite immaterial what portion of the ceded area the Indians may have exclusively occupied and controlled as long as it passes under the terms of the treaty.

What the petitioner Sac and Fox Nation is now urging upon us is nothing more than the converse of the old recognition argument advanced and rejected by the Commission in case of *The Quapaw Tribe of Indians, et al.* v. *United States,* (1 Ind. Cls. Comm. 409). In that case the Quapaw unsuccessfully argued that the setting of boundary lines in a treaty of cession is recognition by the United States of the Indian's title to the ceded area.

The Commission therefore rejects as untenable the petitioner's Sac and Fox claim of recognition to Cession 69 or any portion thereof and concludes that there is no language in the Sac and Fox Treaty of 1804, or any other treaty or statute, which would demonstrate a Congressional intent to award to the Sacs and Foxes in 1804 a greater interest in their unceded lands than in those lands which passed under the treaty of cession.

Before turning our attention to those claims founded upon aboriginal use and occupancy, this comment may be in

order. By virtue of [501] the Louisiana Purchase of April 30, 1803 (8 Stat. 200), the United States acquired from France, subject to the present Indian right of occupancy, a vast expanse of territory which includes the lands in controversy. The bulk of evidence introduced by the petitioners in support of their claim of title cites events occurring just prior to and subsequent to the 1803 date. As we view the evidence in this case, the 1803 date is critical to the issue of aboriginal title, since, in the absence of government recognition (which we have just rejected), these Indians were powerless to increase their aboriginal holdings after 1803. Therefore, each petitioner must satisfy the Commission that it owned in Indian fashion the claimed subject lands or any portion thereof as of 1803, and that it reasonably maintained such ownership until the treaties of cession in 1824.

The petitioner, the Iowa Nation of Indians, comprises two tribes, petitioner, Iowa Tribe of the Iowa Reservation in Kansas and Nebraska and the petitioner, Iowa Tribe of the Iowa Reservation in Oklahoma. Each of these tribes is an identifiable group of Indians residing within the territorial limits of the United States, and both are the successors in interest to Iowa Nation of Indians which participated in the Iowa Treaty of August 4, 1824, and as such are entitled to institute the present action against the United States for and on behalf of the Iowa Nation of Indians and all its members pursuant to the provisions of the Indian Claims Commission Act. (60 Stat. 1049)

The Iowa Nation of Indians, one of the "Chiwere" groups of the Sioux linguistic stock with a close affinity to the Oto and Missouri [502] Indians originally came from east of the Mississippi. Early reports place the Iowa in the late seventeenth century around the Lake Okeboji region in Northwestern Iowa and southwestern Minnesota. Sometime

around the middle of the eighteenth century they departed this area and moved in a southerly direction down the Missouri River into the southwestern part of Iowa where they established a village just south of the present city of Council Bluffs, Iowa. From this village site, which is located northwest of Cession 69, the Iowa hunted the area southward along the Missouri River and east toward the western boundary of Cession 69. During this period this same area, which for the most part lies west and north of Cession 69, was utilized for hunting purposes by other Indian tribes such as the Omaha or Mahas, the Otoes and Missouris.

Sometime between 1755 and 1765 the Iowa Nation abandoned the village site at Council Bluffs, and moved slowly eastward across the southern part of Iowa to the Mississippi River, where eventually it chose to settle at a more permanent village site on the Des Moines River approximately 120 miles from the mouth of the Des Moines. This village lying north of Cession 69 is the best documented of all the Iowa village locations and the one which remained a principal Iowa village site during the years that followed until about 1823.

Two principal factors are attributed to the general exodus of the Iowa Nation from the Council Bluffs area. In the first place, the Iowas were being constantly harassed by their inveterate enemies from the north, the war-like Sioux, who were pressing from the northern [503] plains and conducting extended forays into the western part of Iowa. Of greater moment was the fact that the Iowas desired closer contact with their Spanish and French traders whose operations were centered primarily in St. Louis. With the rapid growth of Indian trading activity, those tribes, including the Iowas, who inhabited this region became more dependent for the simple necessities of life upon what they

could barter with furs and skins. Thus, the period throughout the latter part of the 1700's and into the nineteenth century was marked by an awesome exploitation of many choice hunting grounds coupled with bloody and indecisive fights among competing tribes in search for new and more fertile hunting spots.

Having adapted themselves to the use of the horse, the Iowas hunted extensively west and southwest of their Des Moines River location across the southern part of Iowa to the Missouri and down into their old Council Bluffs hunting grounds, and in the plains between the Grand and Chariton Rivers toward their headwaters. These hunting forays frequently carried them into the northwestern portions of Cession 69. They continued to hunt in this area into the 1800's even after the United States acquired title to the entire area in the Louisiana Purchase of 1803. However, the bulk of Iowa hunting activity during this period was north and west of Cession 69, principally in the southern and southwestern part of Iowa.

At the outbreak of the War of 1812 with Great Britain, the United States, through the offices of William Clark, Governor of this territory, invited the Iowas, as well as the Sac and Fox Indians, to leave their Mississippi and Des Moines River sites, and travel [504] south and west across to the Missouri River. The obvious purpose of Clark's move was to place these Indians outside of the scope of British influence and separate them from their pro-English brethren. Shortly thereafter, the Iowas temporarily removed from their Des Moines River site and filtered down to the south and southwest toward the Missouri River. Thus, we begin to find first reference to new Iowa village locations principally on the Grand River within Cession 69. The first of these apparently was established, but only temporarily, in 1816, its exact whereabouts being unknown. Other members of the Iowa nation moved across to the

Missouri where they joined with the Otoes and the Missouris. With the influx of these Indians into Cession 69, there developed agitation and hostility between the red men and the white settlers who were spotted along both sides of the Missouri River west of the Mississippi. Roving bands of Iowas and Sac and Fox found occasion to renew hostilities with the Osage. It was not until after the War of 1812 that the Iowas, who were now greatly divided, began to reassemble as a nation. Around 1820 they were reported back at their old Des Moines River site but then abandoned it and built a new village on the Grand River in 1823 where the whole nation was reported to be living at one time. After negotiating the Treaty of August 4, 1824, the Iowas remained within Cession 69 only a short period and in 1827 they finally moved to a new village site on the Little Platte River, west of Cession 69. Throughout the period of their known history, the estimated population of the Iowa Nation rarely exceeded 1,000 persons. [505]

Considering the resume of the Iowa History and movement during the critical period in this case as set out above and as supported in more detail by the Commission's Findings 7 thru 14, we find that the evidence in this case does not justify the extent of petitioner's Iowa claim to those lands situated in the western half of Cession 69. Instead, we find that at the time the United States acquired the area in controversy in the Louisiana Purchase of 1803 and up to the time of the Iowa Treaty of August 4, 1824, the Iowa Nation held a good Indian title to those lands situated in the northwestern portion of Cession 69 as described in the Commission's Finding 15.

The petitioner, Sac and Fox Nation, or Confederated Sac and Fox, is composed of three tribes or bands who are petitioners herein. They are, the Sac and Fox Tribe of Indians of Oklahoma, The Sac and Fox Tribe of Missouri,

and the Sac and Fox Tribe of Mississippi in Iowa. Each petitioner tribe or band is adequately represented by individual member petitioners, and each tribe or band is an identifiable group of Indians living within the territorial limits of the United States, and all are the successors in interest to all the tribes and groups of the Confederated Sac and Fox who participated in the Sac and Fox Treaty of August 4, 1824, and, as such, are entitled to maintain this present action against the United States for and on behalf of the Sac and Fox Nation or Confederated Sac and Fox and all its members, pursuant to the provisions of the Indian Claims Commission Act. (60 Stat. 959)

Originally the Sac and Fox Nation consisted of two separate and identifiable tribes of Indians belonging to the Algonquin stock. [506] Around 1735, due to their mutual hostility and conflict with the French, they formed a close and intimate alliance, politically and socially, so that from thence forward they have been dealt with and referred to as a single nation both in their relationship with the other Indian tribes and in treaty negotiations and other matters with the United States.

It was shortly after this merger that the members of the Sac and Fox Nation began to establish themselves in Iowa. They maintained for many years and on into the 1800's several separate but permanent villages constructed along and on both sides of the Mississippi River, from as far up as the Prairie du Chien and Turkey River area, to as far down as the mouth of the Des Moines River in Cession 120. For the most part the Fox Indians occupied the upper villages and the Sac Indians the lower villages, including the small village near the mouth of the Des Moines River. The principal Sac and Fox village sites during this period were located on the Rock River which is considerably north of the lands in controversy. Auguste Chouteau places the establishment of the Rock River location as 1764, while

first references to the Sac village on the Des Moines River occur around 1780. All of these village sites are confirmed in subsequent reports, and in 1810 Debulon [Zebulon] Pike sets them out specifically in a report on his 1805 Mississippi River expedition. (See Commission's Finding 19)

During the War of 1812 with Great Britain, those members of the Sac and Fox Nation, who claimed allegiance to the cause of the United States departed their Mississippi River villages, and began to move [507] down into Cession 69. There, during the years that followed, they were located at various places, and at times in the company of the Iowas. Reports have placed them on the Salt, Missouri, Osage, Grand and Chariton Rivers. Best estimates as to the termination date of the Sac Des Moines River village fall within the period of 1821 to 1833, when after abandoning this location, the Sacs resettled on the Iowa River.

Having established their villages on the Mississippi around 1760, the Sac and Fox began to hunt the adjacent area on both sides of the river from as far north as Prarie [Prairie] du Chien to as far south as the mouth of the Illinois River. The principal hunting grounds of the Sac Indians west of the Mississippi River stretched southward below the Des Moines River to the Missouri River, and includes generally the northeastern part of Cession 69 and all of Cession 50. Cession 50 lies immediately east of Cession 69 and west of the Mississippi, and embraces all those lands which were ceded to the United States by the Sac and Fox Treaty of 1804 (7 Stat. 84). The evidence contains many references to the Sac and Fox hunting in this vicinity which show consistent use from about 1780 to at least 1810. Black Hawk, the intrepid Sac and Fox warrior, was quite specific in stating that the "Two River" country, during this period was the choice

hunting ground of his people. This reference points to the northeastern part of Cession 69.

During the entire period in which the Sac and Fox inhabited this Mississippi River area, they found themselves involved in [508] perpetual warfare with their Osage neighbors from the South, who had their villages just below the Missouri River outside of Cession 69. Black Hawk, in his biography, speaks of his many engagements with the Osages who were a constant threat to the Sac and Fox hunting grounds. This habitual agitation and fighting between these two nations created a veritable "no man's" land of southeast Cession 69 and the southern portion of Cession 50 until at least 1808, when the Osage Nation by treaty ceded to the United States all its right, title, and interest to those lands north of the Mississippi (7 Stat. 107).

After 1810 the Sac and Fox hunting grounds adjacent to the Mississippi River became so depleted that the quest for new and more productive areas compelled these Indians to extend their hunting expeditions over great distances west and northwest to the headwaters of the Grand and Chariton Rivers, and even further north to the headwaters of the Des Moines and Iowa Rivers. Because of the hazards and hardships involved, many of these Indians, particularly the Foxes, abandoned these long treks and concentrated on mining lead at their mines near Dubuque, Iowa.

In the years that followed the close of the War of 1812, and up until the Sac and Fox Treaty of 1824, this Nation can only be pictured as a wandering nomadic group, scattered in all directions, and challenging the other Missouri River Indians for control of the few remaining hunting areas near the Missouri River and its northern tributaries.

During the period in question, the best population estimates of the combined Sac and Fox tribes range between 4,400 and 6,500 persons. [509]

The Commission therefore concludes from all the evidence and the facts as set out in the Commission's Findings 18 thru 22, that, at the time the United States acquired the area in controversy by virtue of the Louisiana Purchase of 1803, and up to the time of the Sac and Fox Treaty of 1824, the Sac and Fox Nation held Indian title to those lands situated in the northeastern part of Cession 69 as described in the Commission's Finding 23.

Finally, we shall dispose of the title question surrounding Cession 120, the aforementioned "Half-breed" tract. While the petitioner, Iowa Nation, disclaims any interest concerning Indian title to these lands, the petitioner, Sac and Fox, is asking this Commission to treat these lands as part and parcel of Cession 69 insofar as determining the question of title. We feel, however, that in accord with the plain and unequivocal language of the Sac and Fox Treaty of 1824 coupled with subsequent Congressional action, the question of Indian title has been determined. (Commission's Finding 24)

Under the terms of the Treaty of 1824 a reservation was given outright to the Sac and Fox half-breeds, and this reserve was never ceded back or purchased by the United States, although requested to do so by the Sac and Fox. Instead, Congress by the Act of June 30, 1834, released its reversionary interest therein to the Sac and Fox half-breeds, granting them the full power and authority to transfer and convey a full fee. Petitioner, Sac and Fox, would now challenge the defendant's motive in setting up this particular reservation, but this in no way attacks the au-

thority and power of Congress to act in this regard in the manner it chose. [510]

On the proofs before us the Commission finds no basis upon which to attach either legal or moral liability to the defendant, if we deal with Cession 120 as we would in the ordinary title case involving lands ceded to the United States. However, we shall reserve final judgment in the matter of Cession 120 and afford an opportunity to the petitioner Sac and Fox, if it so desires, to present any additional evidence, covering the period of 1824 to 1834, which would demonstrate to the satisfaction of the Commission that the defendant's conduct relative to the "Half-breed" tract worked such an injustice or injured the petitioner Sac and Fox in such a way as would oblige and compel the defendant to respond in measurable damages under the provisions of the Indian Claims Commission Act.

Having determined the question of title in favor of the petitioners to those portions of Cession 69 as set out in the Commission's Findings No. 13 and No. 21, we shall in like fashion reserve judgment on the question of defendant's liability until proof has been offered on the questions of the consideration paid to the Indians for the ceded lands, the total acreage, and the value at the time title thereto passed to the defendant.

We note that the lands described in Findings Nos. 15 and 23 herein are within the area claimed by the Osage Nation of Indians in Docket No. 105, now pending before the Commission, and for which the Osage are claiming additional compensation for lands including those described in Findings 15 and 23. No request for consolidation for trial, because of the conflict of interests, has been made by any party to the claims [511] set forth in Docket No. 135 or

Docket No. 105. It may, therefore, be necessary to withhold the final determination in Docket No. 135 until the claim of the Osage is determined.

s/ Edgar E. Witt
Chief Commissioner

We Concur:

s/ Louis J. O'Marr
Associate Commissioner

s/ Wm. M. Holt
Associate Commissioner [512]

IN THE UNITED STATES COURT OF CLAIMS

Appeal No. 9—65
Ind. Cl. Comm. Docket No. 135
6 Ind. Cl. Comm. 464 (1958)
12 Ind. Cl. Comm. 487 (1963)
15 Ind. Cl. Comm. 248 (1965)
(Decided March 17, 1967)

THE SAC AND FOX TRIBE OF INDIANS OF OKLAHOMA, ET AL., THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, THE IOWA TRIBE OF THE IOWA RESERVATION IN OKLAHOMA, ET AL. v. THE UNITED STATES

OPINION

SKELTON, Judge.

The appellants, the Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, and the Iowa Tribe of the Iowa

Reservation in Oklahoma (hereinafter called the "Iowa"), are the sole successors in interest to the Iowa Nation of Indians and bring this suit on behalf of said nation and all its members.

The appellants, the Sac and Fox Tribe of Indians of Oklahoma, the Sac and Fox Tribe of Missouri, and the Sac and Fox Tribe of the Mississippi in Iowa (hereinafter called the "Sac and Fox"), each represented by individual members of the respective tribes, are the sole successors in interest to the rights of the Sac and Fox Nation. They maintain this suit on behalf of said nation and all of its members.

This is an appeal from decisions of the Indian Claims Commission [1] which held that:

(1) The Iowa held original Indian title to 1,551,200 acres of land in northwestern Misscuri in what is designated on Royce's maps of Indian land cessions as Area 69 (sometimes called Cession 69),[2] which was part of the area ceded to the United States pursuant to the Treaty of August 4, 1824,[3] and the sum of $19,846.23 paid to them by the Government was an unconscionable consideration for the land; and the fair market value of the ceded Indian lands as of January 18, 1825 (the effective date of the treaty) was 45 cents per acre or the total sum of $698,040, which the Iowa were entitled to receive, less allowable offsets in the sum of $45,000 and less the amount of $19,846.23 already paid, making the net amount to be paid the sum of $633,193.77.

(2) The Sac and Fox held original Indian title to 1,241,700 acres of land in northeastern Missouri in Area 69, which was part of the land ceded to the United States in the

[1] 6 Ind. Cl. Comm. 464 (1958); 12 Ind. Cl. Comm. 487 (1963); 15 Ind. Cl. Comm. 248 (1965).

[2] 18th Annual Rep., B.A.E., 1896-1897, Part II.

[3] 7 Stat. 231.

Treaty of 1824; and the $27,799.61 paid to them by the Government was an unconscionable consideration for the land; and the fair market value of their aboriginal lands as of January 18, 1825 (the effective date of the treaty), was 80 cents per acre or the total sum of $993,360, and accordingly, they should be paid such amount less the sum already paid, making the amount due the sum of $965,560.39.

(3) The Sac and Fox did not have recognized title to any of the land by reason of the Treaty of 1804 (7 Stat. 84) or any other treaty or act.

(4) The claims of both tribes that they held original title to additional lands in Area 69 were rejected.

(5) The Iowa were not entitled to a higher market value than 45 cents per acre for their aboriginal land.

(6) There was no "constructive trust" existing in favor of the tribes because of an alleged fiduciary relationship between them and the Government, or for any other reason, which entitled them to be paid whatever profit it made when it later sold the land.

(7) The tribes were required to prove they had aboriginal title to their lands in 1803, and held such title until the date of the Treaty in 1824; and no evidence of Indian title acquired after 1803 could be considered because the Government acquired the sovereign title to all of the land in that year from France by the Louisiana Purchase [992]

The claims of both the Iowa and the Sac and Fox were tried together by the Indian Claims Commission and will be disposed of together in this appeal.

In this case both the Iowa and the Sac and Fox contend that: they held aboriginal title to more land than was awarded to them and consequently they were entitled to

larger awards; because of the fiduciary relationship existing between them and the Government, a "constructive trust" was created under clause (2), section 2 of the Indian Claims Commission Act [4] which entitled them to the profit made by the United States when it later sold the land, or, in the alternative, clause (5), section 2 of the Act relating to fair and honorable dealings entitled them to such profits; and the Commission erred when it required them to prove aboriginal title as of 1803, the date of the Louisiana Purchase, instead of 1824, the date of the Treaty.

In addition, the Iowa say that the land awarded to them should have been valued at 80 cents per acre instead of 45 cents; and the Sac and Fox allege that their award should be based on their title which was recognized by the United States in the Treaty of November 3, 1804,[5] instead of on aboriginal title.

Before discussing the issues, perhaps it would be well to describe briefly the background history, way of life and geographical locations of the Iowas and the Sac and Fox tribes.[6] This should be particularly helpful in connection with their claims to land based on Indian or aboriginal title. Accordingly, for the sake of brevity, we set forth below the background description, location, and movements of these tribes prior to 1824, as made by the Indian Claims Commission, with such changes and additions as the record justifies.

I

The Iowa Nation of Indians, one of the "Chiwere" groups of the Sioux linguistic stock with a close affinity to the Otoe

[4] Indian Claims Commission Act, 60 Stat. 1049, 1050, 25 U.S.C. § 70a (1964).

[5] 7 Stat. 84.

[6] A map is appended to this opinion for the sake of clarity.

and Missouri Indians originally came from east of the Mississippi. Early reports place the Iowa in the late seventeenth century around the Lake Okeboji region in northwestern Iowa and southwestern Minnesota. Sometime around the middle of the eighteenth century they departed this area and moved in a southerly direction down the Missouri River into the southwestern part of Iowa where they established a village just south of the present city of Council Bluffs, Iowa. From this village site, which is located northwest of Cession 69, the Iowa hunted the area southward along the Missouri River and east toward the western boundary of Cession 69. During this period this same area, which for the most part lies west and north of Cession 69, was utilized for hunting purposes by other Indian tribes such as the Omaha or Mahas, the Otoes and Missouris.

Sometime between 1755 and 1765, the Iowa Nation abandoned the village site at Council Bluffs, and moved slowly eastward across the southern part of Iowa to the Mississippi River, where eventually it chose to settle at a more permanent village site on the Des Moines River approximately 120 miles from the mouth of the Des Moines. This village lying north of Cession 69 is the best documented of all the Iowa village locations and the one which remained a principal Iowa village site during the years that followed until about 1823.

Two principal factors are attributed to the general exodus of the Iowa Nation from the Council Bluffs area. In the first place, the Iowas were being constantly harassed by their inveterate enemies from the north, the war-like Sioux, who were pressing from the northern plains and conducting extended forays into the western part of Iowa. Of greater moment was the fact that the Iowas desired closer contact with their Spanish and French traders whose operations [993] were centered primarily in St. Louis. With the rapid growth of Indian trading activity, those tribes, including the

Iowas, who inhabited this region became more dependent for the simple necessities of life upon what they could barter with furs and skins. Thus, the period throughout the latter part of the 1700's and into the nineteenth century was marked by an awesome exploitation of many choice hunting grounds coupled with bloody and indecisive fights among competing tribes in search for new and more fertile hunting spots.

Having adapted themselves to the use of the horse, the Iowas hunted extensively west and southwest of their Des Moines River location across the southern part of Iowa to the Missouri and down into their old Council Bluffs hunting grounds, and in the plains between the Grand and Chariton Rivers toward their headwaters.

The Indian Claims Commission found as a fact in a prior case as follows:

> 32. During the period from approximately 1765 to 1812, the Iowa Nation hunted for furs in their traditional hunting grounds to the southwest of Cession 175 and these traditional hunting grounds were bounded as follows:
>
> On the east by the watershed between the Grand and Chariton Rivers; on the south by the Missouri River; on the west by the Missouri River up to the western watershed of the Nodoway River and then by the watershed between the Nodoway and Nishnabotna Rivers; and on the north by the Des Moines River. [*The Sac and Fox Tribe of Indians of Oklahoma* v. *United States*, Docket No. 158, 5 Ind. Cl. Comm. 367, 379 (1957).]

The record is replete with evidence that during the period from 1800 to 1824, the Iowas hunted over the entire western part of Area 69 (Cession 69) extending from the watershed between the Grand and Chariton Rivers on the east to the Missouri, Nodoway and Nishnabotna Rivers on the west, and from the Des Moines River on the north to the Missouri

River on the south. Much of the evidence indicates they had villages scattered throughout this area during this period, although some of them were moved about from time to time. By 1800, they had driven the Missouris, Osage and Kansas Indians out of this entire territory and were in complete control of the land north of the Missouri River. Much of this evidence was obtained from statements, records and quotations from explorers, generals, governors, historians and others who visited or lived in the area during this period.

At the outbreak of the War of 1812 with Great Britain, the United States, through the offices of William Clark, Governor of this territory, invited the Iowans, as well as the Sac and Fox Indians, to leave their Mississippi and Des Moines River sites, and travel south and west across to the Missouri River. The obvious purpose of Clark's move was to place these Indians outside of the scope of British influence and separate them from their pro-English brethren. Shortly thereafter, the Iowans temporarily removed from their Des Moines River site and filtered down to the south and southwest toward the Missouri River. Other members of the Iowa nation moved across to the Missouri where they joined with the Otoes and the Missouris. With the influx of these Indians into Cession 69, there developed agitation and hostility between the red men and the white settlers who were spotted along both sides of the Missouri River west of the Mississippi. Roving bands of Iowas and Sac and Fox found occasion to renew hostilities with the Osage. It was not until after the War of 1812 that the Iowas, who were now greatly divided, began to reassemble as a nation. Around 1820, they were reported back at their old Des Moines River site but then abandoned it and built a new village on the Grand River in 1823, where the whole nation was reported to be living at one time. After negotiating the Treaty of August 4, 1824, the Iowas remained within Cession

69 only a short period and in 1827 they finally moved to a new village site [994] on the Little Platte River, west of Cession 69. Throughout the period of their known history, the estimated population of the Iowa Nation rarely exceeded 1,000 persons.

These facts would seem to justify an examination of the evidence to determine whether or not at the time of the Treaty of 1824, the Iowa had actually, exclusively, and continuously used and occupied for a long time the western part of Cession 69 described above.

II

Originally the Sac and Fox Nation consisted of two separate and identifiable tribes of Indians belonging to the Algonquin stock. Around 1735, due to their mutual hostility and conflict with the French, they formed a close and intimate alliance, politically and socially, so that from thence forward they have been dealt with and referred to as a single nation both in their relationship with the other Indian tribes and in treaty negotiations and other matters with the United States.

It was shortly after this merger that the members of the Sac and Fox Nation began to establish themselves in Iowa. They maintained for many years and on into the 1800's several separate but permanent villages constructed along and on both sides of the Mississippi River, from as far up as the Prairie du Chien and Turkey River area, to as far down as the mouth of the Missouri River. For the most part the Fox Indians occupied the upper villages and the Sac Indians the lower villages, including the small village near the mouth of the Des Moines River. The principal Sac and Fox village sites prior to 1800, were located on the Rock River which is considerably north of the lands in controversy. Auguste Chouteau places the establishment of

the Rock River location as 1764, while first references to the Sac village on the Des Moines River occur around 1780. All of these village sites are confirmed in subsequent reports, and in 1810, Zebulon Pike sets them out specifically in a report on his 1805 Mississippi River expedition.

During the War of 1812 with Great Britain, those members of the Sac and Fox Nation, who claimed allegiance to the cause of the United States departed their Missisippi River villages, and began to move down into Cession 69. There, during the years that followed, they were located at various places, and at times in the company of the Iowas. Reports have placed them on the Salt, Missouri, Osage, Grand and Chariton Rivers.

Having established their villages on the Mississippi around 1760, the Sac and Fox began to hunt the adjacent area on both sides of the river from as far north as Prairie du Chien to as far south as the mouth of the Illinois River. The principal hunting grounds of the Sac Indians west of the Mississippi River stretched southward below the Des Moines River to the Missouri River, and includes generally the northeastern part of Cession 69 and all of Cession 50. Cession 50 lies immediately east of Cession 69 and west of the Mississippi, and embraces all those lands which were ceded to the United States by the Sac and Fox Treaty of 1804. The evidence contains many references to the Sac and Fox hunting in this vicinity which show consistent use from about 1780 to at least 1810.

During the period from 1795 to 1824, the Sac and Fox hunted extensively the area in the eastern and southern parts of Cession 69 from the Mississippi on the east to the Grand and Chariton Rivers on the west and from headwaters of such last-mentioned rivers on the north to the Missouri River on the south, and even beyond this area on

the west and south. They were friendly with the Iowa and frequently hunted in the same area with them. The early explorers, traders, and military people supplied much of this evidence and information. For instance, in his 1806 Report to the Congress, Captain Lewis said that the Sac and Fox Nation sometimes hunted toward the Missouri and Lieutenant Pike in 1810, based on his explorations made in 1805, stated that the Sacs hunted on the Mississippi River and its tributaries from the Illinois [995] River north to the River Iowa "and on the plains west of them which border the Missouri."

Captain Lewis in 1808 described the Fire Prairie, which is located near the southwest corner of Cession 69 as convenient to "the principal hunting grounds of the Ioways and Saucs."

The Missouri Gazette informed its readers in 1813 that more than 1500 Sac and Fox Indians had gone to their "wintering grounds, * * * besides those contained in 155 canoes which ascended the Missouri on Monday last, near 500 warriors crossed over by land."

Two years later, General Clark reported that members of the Sac and Fox Nation resided west to northwest of St. Louis on both sides of the Missouri River. In 1819, Major Long who had recently explored the Missouri River, stated that the Sac and Fox and Iowa Nations hunted on the plains towards the sources of the Grand River. Indian Agent Sibley in 1820, reported that the Sac and Fox and Iowa Indians regularly made a fall hunt on the Missouri River. Sac and Fox Agent Forsyth mentions the presence of Sac and Fox along and near the Missouri River and in the vicinity of the Grand River in the years 1817 to 1820. In an extensive report concerning the Sac and Fox Nation which Agent Forsyth originally wrote in 1822, and later revised in

1827, he says that the members of the Sac and Fox Nation would hunt "on the waters of the Missouri River and its tributaries" and sometimes further west.

From about 1812 to 1825, the Sac and Fox Nation had a village on the north side of the Missouri River between the Chariton and Grand Rivers and therefore on the west boundary of the lands claimed in this appeal. An early settler reported that the Sac and Fox had a village in 1818 east of the Chariton River in present Randolph County, Missouri, near the present town of Yates. In 1819, there was a Sac camp on the Missouri River below Fort Osage and also near the mouth of the Grand River. For a time (1815-1818) there was also a Sac village south of the Missouri River near Jefferson City, Missouri.

During the period under consideration, it is estimated that the combined populations of the Sac and Fox tribes was between 4,400 and 6,500 persons.

It appears from all the facts that there was some basis for the claim of the Sac and Fox Nation that it had actual exclusive and continuous use and possession of the east and south portions of Cession 69 for a long time prior to the Treaty of 1824.

The United States made two separate but similar treaties with the Iowa and the Sac and Fox on August 4, 1824, 7 Stat. 229 and 7 Stat. 231, by the terms of which both tribes ceded to the United States all their right, title, interest, and claim to the lands in northern Missouri which are designated on Royce's maps of Indian land cessions as Area 69 (18th Annual Rep., B.A.E. 1896-1897, Part II). Both tribes later filed a joint petition in this case with the Indian Claims Commission under the Indian Claims Commission Act, *supra*, seeking additional compensation for the cession of their respective tracts of land within Area 69 for all of the reasons set forth above.

III

We will consider first the issue raised by the Iowa and the Sac and Fox as to whether or not the Indian Claims Commission erred in making 1803 the cutoff date in establishing Indian title to the lands in question. Both tribes offered much evidence bearing on their acquisition of aboriginal title after 1803, and up to 1824, but the Commission refused to consider it, saying:

> Before turning our attention to those claims founded upon aboriginal use and occupancy, this comment may be in order. By virtue of the Louisiana Purchase of April 30, 1803 (8 Stat. 200), the United States acquired from France, subject to the present Indian right of occupancy, a vast expanse of territory which includes the lands in [996] controversy. *The bulk of evidence* introduced by the petitioners in support of their claim of title cites events occurring just prior to and subsequent to the 1803 date. As we view the evidence in this case, the 1803 date is critical to the issue of aboriginal title, since, in the absence of government recognition (which we have just rejected), these Indians were powerless to increase their aboriginal holdings after 1803. Therefore, each petitioner must satisfy the Commission that it owned in Indian fashion the claimed subject lands or any portion thereof as of 1803, and that it reasonably maintained such ownership until the treaties of cession in 1824.[7] [Emphasis supplied.]

It will be observed that the Commission itself states that *the bulk of evidence* offered by the tribes in support of Indian title cites events occurring just prior to and subsequent to 1803. The record supports this statement by the Commission. The sole question then, on this point, is, whether or not the Commission should have considered such evidence as proof of Indian title of the tribes to the land

[7] 6 Ind. Cl. Comm. 464, 501-02 (1958).

claimed by them in Cession 69. We think the Commission should have done so.

In refusing to consider the post 1803 evidence, the Commission appeared to have confused Indian title with sovereign or legal title, although there is a great difference between them. At any rate, the Commission took the position that once sovereign title attached to land, Indian title could not thereafter be established. We do not agree.

Chief Justice John Marshall thoroughly discussed sovereign title and Indian title in the early case of *Johnson & Graham's Lessee* v. *McIntosh*, 21 U.S. (8 Wheat.) 543, 570-603 (1823). He pointed out that when the various parts of the new world were discovered by explorers of the nations of Europe, a principle of international law was developed and recognized by all the nations to the effect that discovery of new land carried with it the right of sovereignty or sovereign title to the discovered land which vested immediately in the sovereign of the nation whose explorer discovered it, subject to the right of use and occupancy by Indians living on it. Of course, the boundaries of discoveries were many times vague and indefinite, and this led to disputes and even wars between the nations over the sovereign or legal title or ownership to a given area of land. But the basic principle of sovereign title was recognized by all. It gave the sovereign the absolute right to sell, give or grant the legal title to another person or to another nation. No one questioned this right once sovereignty was established over land. It was inevitable such a system would develop in the scheme of things as it existed at the time of the new world discoveries. Obviously sovereign or legal title to land could not be in two different nations or persons at the same time, as no sale of it could ever be made under such circumstances.

However, the right of sovereignty over discovered land was always subject to the right of use and occupancy and enjoyment of the land by Indians living on the land. This right of use and occupancy by Indians came to be known as "Indian title." It is sometimes called "original title" or "aboriginal title." It is not the same as sovereign or legal title. Land owned by Indian title is owned by the tribe and not by an individual Indian. It must be used within the tribe and subject to its laws and customs and cannot be sold to another sovereign government nor to a citizen of any sovereign government. *Johnson & Graham's Lessee* v. *McIntosh, supra.*

This system of right of discovery and its inclusion of sovereign title subject to Indian title held by Indians living on the land was accepted by the United States and became a part of its laws. *Johnson & Graham's Lessee* v. *McIntosh, supra*; *Worcester* v. *State of Georgia*, 31 U.S. [997] (6 Pet.) 515 (1832). It has been observed and applied through the years by the Government in its acquisition and sale of land where Indian title existed. In cases involving these situations, the courts have held that sovereign or legal title to land, as distinguished from Indian or aboriginal title, may be obtained (aside from discovery or the purchase from the sovereign of a discoverer) by treaty, statute or an agreement. *Otoe and Missouria Tribe of Indians* v. *United States*, 131 F. Supp. 265, 275, 131 Ct. Cl. 593, 608, (1955), *cert. denied*, 350 U.S. 848, 76 S. Ct. 82, 100 L. Ed. 755.

Indian title has likewise been defined many times by the courts. For instance this court defined it in the case of *Sac and Fox Tribe of Indians of Oklahoma* v. *United States*, 315 F. 2d 896, 903, 161 Ct. Cl. 189, 201-02, (1963), *cert. denied* 375 U.S. 921, 84 S. Ct. 266, 11 L. Ed. 2d 165, as follows:

> • • • To be accepted under the Indian Claims Commission Act, aboriginal title must rest on actual, exclu-

> sive, and continous use and occupancy "for a long time" prior to the loss of the property. (Cases omitted.)

See also *Confederated Tribe of the Warm Springs Reservation of Oregon* v. *United States,* App. No. 2-64, decided October 14, 1966, slip op. p. 6, and cases collected therein.

The courts have also construed the terms "use and occupancy" requirement of Indian title to mean use and occupancy in accordance with the way of life, habits, customs and usages of the Indians who are its users and occupiers. In the case of *Mitchel* v. *United States,* 34 U.S. (9 Pet.) 711, 745, 9 L. Ed. 283 (1835), the Supreme Court said:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; * * *.

See also *Confederated Tribes of the Warm Springs Reservation of Oregon* v. *United States, supra.*

It is a matter of common knowledge that in the course of years, and especially during the early years of the United States, the use and occupancy of land by Indian tribes changed continuously. New tribes would appear and old ones would disappear or move on to new territories. Sometimes land of one tribe would be exchanged for that of another, or one tribe would acquire the land of another as the result of an Indian war or by right of conquest.

In the case before us, the Indian Claims Commission approved and recognized the right of discovery doctrine with its attribute of sovereign title to land by holding that the United States acquired sovereign title to the lands in question in 1803, by virtue of the Louisiana Purchase from France. In other words, it held that France had sovereign title by right of discovery, subject to the right of use and occupancy by Indians living on it, and we purchased that title in 1803. Inferentially, if there had been any change in

Indian title among the Indians using and occupying the land between the time of the French discovery and the French sale to our Government in 1803, such change would have been recognized. But the Commission froze all changes in Indian title as of 1803, and refused to consider any changes between that date and 1824, the date of the Treaty of Cession. If the Commission had been consistent, it would have frozen the date of changes of Indian title as of the date of discovery of the land by the French instead of 1803. The Louisiana Purchase only gave us such title as the French had and there was no addition to the validity of the sovereign title to the land by our purchase of it in 1803—there was no magic to that date.

It would not be in accordance with facts nor history to freeze all Indian titles as of the date of the discovery of America, nor with our own Declaration of Independence in 1776. We know that [998] there was considerable change in such titles after these dates. Consequently, it is not possible to fix any cutoff date for the establishment of Indian title, except the date the Indians lose the land through treaty or otherwise. In this case, that date is 1824, the date of the cession of the land to the United States by treaty.

By refusing to consider evidence of Indian title acquired after 1803, the Commission took the position, in effect, that since the United States acquired sovereign or legal title from France in 1803, no one—not even the Indians—could acquire any kind of title—not even Indian title—after that date except by grant from the Government itself. Such a position would be correct as to sovereign or legal title, but not as to Indian title.

We think the Commission committed error in refusing to consider the evidence of the tribes as to Indian title acquired by them between 1803 and 1824. Use and occupancy of a portion or of all of the land in question by them between

these dates, especially when connected with use and occupancy immediately prior to 1803, could well have been use and occupancy "for a long time" and sufficient to constitute Indian title to the land.

Accordingly, we remand this case to the Commission for its consideration of Indian title evidence between 1803 and 1824, so that it may determine from such evidence whether or not the land awarded to the Iowa or the Sac and Fox, or either of them, should be increased or changed in any way, and, if changed, to determine the change, if any, of the award to be made to them and to each of them, all in accordance with this opinion.

IV

We hold that there is substantial evidence to support the decision of the Commission that the fair market value of the Iowa land as of January 18, 1825, was $0.45 per acre and the fair market value of the Sac and Fox tract as of that date was $0.80 per acre. However, upon remand of this case, should the Commission determine that the amount of land due either or both tribes should be changed or enlarged, the Commission will at the same time determine whether or not the per acre valuation of either or both tracts should be changed, and if so, the amount of such change.

V

We agree with the Commission that the United States did not recognize the title of the Sac and Fox to any of the land claimed in this case by the Treaty of November 3, 1804.

VI

The alternative theory of recovery advanced by the tribal claimants is founded upon a purported "constructive trust"

that existed between the United States and the appellants' ancestors with respect to the defendant's acquisition of the two subject tracts. This theory is not concerned with fixing a fair market value to the lands involved, but the amount of any recovery is to be measured by the value of the consideration that the defendant received in disposing of these lands through public sale or otherwise.

The main thrust of appellants' argument is that by virtue of certain legislative enactments such as the Trade and Intercourse Act of 1802, 2 Stat. 139,[8] a [999] certain fiduciary rela-

[8] Section 12 of the Act of March 30, 1802, 2 Stat. 139, 143, entitled "An Act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers" is as follows:

"Sec. 12. *And be it further enacted*, That no purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed, punishable by fine not exceeding one [999] thousand dollars, and imprisonment not exceeding twelve months: *Provided nevertheless*, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty."

Appellants also rely upon the following passage of the Northwest Ordinance originally adopted in 1787, and reenacted and confirmed on August 7, 1789, 1 Stat. 50, 52:

"ART. III. * * * The utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them."

Appellants place emphasis on the following articles of their respective treaties:

tionship was placed on the United States with respect to appellants and that the defendant's payment of an unconscionable consideration for the lands involved worked a fraud upon the Indian tribes resulting in the imposition of a "constructive trust."

In summary then, appellants contend that the defendant finds itself in the position of a constructive trustee because of its guardian-ward, or other fiduciary relationship to the tribal claimants; that the defendant breached its fiduciary duties when it acquired the subject tracts for an unconscionable consideration; and that this necessitates a recovery in a sum equal to the consideration received by the defendant from its disposition of their lands.

Appellants' reliance on the Trade and Intercourse Act of 1802, is prompted by our recent decision in *Seneca Nation* v. *United States*, 172 Ct. Cl. 917 (1965) which construed a prior version of this same Act. In that case, the Senecas

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"Treaty of August 4, 1824, 7 Stat. 231 (Iowa Tribe);

"ARTICLE 4th. The undersigned Chiefs, for themselves, and all parts of the Ioway Tribe, do acknowledge themselves and the said Ioway Tribe, to be under the protection of the United States of America, and of no other sovereign whatsoever; and they also stipulate, that the said Ioway Tribe will not hold any treaty with any foreign powers, individual state, or with individuals of any state.

"Treaty of November 3, 1804, 7 Stat. 84, 85 (Sac and Fox);

"ARTICLE 1. The United States receive the united Sac and Fox Tribes into their friendship and protection, and the said tribes agree to consider themselves under the protection of the United States, and of no other power whatsoever.

* * * * *

"ART. 4. The United States will never interrupt the said tribes in the possession of the lands which they rightfully claim, but will on the contrary protect them in the quiet enjoyment of the same against their own citizens and against all other white persons who may intrude upon them. And the said tribes do hereby engage that they will never sell their lands or any part thereof to any sovereign power, but the United States, nor to the citizens or subjects of any other sovereign power, nor to the citizens of the United States."

sought to charge the United States for four sales of their lands by them, at allegedly inadequate prices, to private parties. As to three of the sales (those which occurred after the passage of the Act) we concluded that the Indian Claims Commission erred in failing to hold that, through the Trade and Intercourse Act, the United States had a special, a fiduciary, responsibility over sales to third parties to see that a proper and conscionable consideration was paid. We said that wherever the Act applied the United States would be liable under either clause (3) or clause (5) of section 2 of the Indian Claims Commission Act,[9] [1000] *supra*, as a fiduciary for an unconscionably low consideration received by the Indians.

The question, if there was one, of the measure of damages was not reached since the case was remanded to the Commission for a determination of whether consideration paid by the vendees was unconscionable.

From that case the appellants stride to the proposition that if the defendant can be held liable as a fiduciary to an Indian tribe for an unconscionable sale of tribal lands to a third party by the Indians, obviously the defendant should be fully accountable as a fiduciary to the Indians where it was a party to the unconscionable transaction.

Although we agree that the appellants should be compensated for their land, it does not follow in the circumstances of this case that the remedy for payment by the defendant of an unconscionable consideration is the imposition of a "constructive trust" compelling the defendant to disgorge

[9] Clauses (3) and (5) of section 2 provide: "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, * * *: (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, * * *; (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity.

whatever profit it made from subsequent sales to homesteaders.

As previously mentioned, we were not faced with that issue in *Seneca Nation, supra,* but it should be noted that section 12 of the Trade and Intercourse Act of 1802, related to transactions between Indian tribes and *third parties* and requires the consent of the Federal Government to any disposition of Indian lands to *third parties.* That Act adds little to judicial expressions that the Government, in its dealings with the property of Indians, is a trustee. *Cf. Oneida Tribe* v. *United States,* 165 Ct. Cl. 487, 493 (1964), *cert. denied,* 379 U.S. 946 85 S. Ct. 441, 13 L. Ed. 2d 544.[10] But the label attached to the relationship by the courts, whether it be trustee, fiduciary, or guardian is unimportant alone and does not control the measure of accountability. We must look to the language contained in the treaty, agreement, order, or statute under which the claim is brought to ascertain whether there exists, (1) a legal relationship wherein the United States is in fact and in law a trustee, fiduciary or guardian, or (2) a general relationship without any of such attributes or obligations, but which is described in the same terms by the courts. *United States* v. *Seminole Nation,* 173 F. Supp. 784, 790, 146 Ct. Cl. 171, 181 ((1959); *Gila River Pima-Maricopa Indian Community* v. *United States,* 140 F. Supp. 776, 780-81, 135 Ct. Cl. 180, 189 (1956). Compare *Ottawa Tribe* v. *United States,* 166 Ct. Cl. 373 (1964), *cert. denied,* 379 U.S. 929, 85 S. Ct. 324, 13 L. Ed. 2d 341; *Navajo Tribe of Indians* v. *United States,* 364 F. 2d 320, 322, 176 Ct. Cl. 502, 504 (1966); see *Oneida Tribe, supra.* When this is done in this case, we are required to hold that the relationship between the parties was a general one in which there was no legal guardianship or resultant constructive trust.

[10] This statement is equally applicable to the provisions of the treaties and other acts the appellants rest upon for support.

Appellants can point to no language in the Trade and Intercourse Act, their treaties, or other legislation which would justify imposition upon the defendant of a liability greater than that which is ordinarily exacted in comparable situations, namely, the fair market value of the lands at the date of acquisition by the defendant. *United States* v. *Emigrant New York Indians*, App. No. 2-65, decided October 14, 1966, slip op. p. 19; *Sac and Fox Tribe of Indians of Oklahoma* v. *United States, supra*, 315 F. 2d at 897, 161 Ct. Cl. at 199; *Miami Tribe of Oklahoma* v. *United States*, 175 F. Supp. 926, 954, 146 Ct. Cl. 421, 470 (1959); *United States* v. *Kiowa, Commanche and Apache Tribes*, 163 F. Supp. 603, 608, 143 Ct. Cl. 534, 541-42 (1958); *Nooksack Tribe* v. *United States*, 162 Ct. Cl. 712, 718 (1963), *cert. denied*, 375 U.S. 993, 84 S. [1001] Ct. 633, 11 L. Ed. 2d 479; see *Otoe and Missouria Tribe of Indians* v. *United States, supra*, 131 F. Supp. at 290, 131 Ct. Cl. at 632-33.

In cases much stronger than the present where this court held that prices paid to the Indians for surplus unallotted *reservation* lands were unconscionable and that *duress* was exerted upon them by the defendant to complete the transaction, there was no suggestion that recovery of the net proceeds received by the defendant from white settlers would be proper. In fact, the court valued these surplus lands as of the date of ratification of an agreement with the Indians for the purchase of their lands for white settlement. *Sac and Fox Tribe of Indians of Oklahoma* v. *United States*, 340 F. 2d 368, 167 Ct. Cl. 710 (1964).

We are not persuaded by the appellants' attempt to circumvent this rule by channeling their claim through clause (2) of section 2 of the Indian Claims Commission Act.[11]

[11] Clause (2) of section 2 provides: "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, * * *: (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; * * *.

The defendant properly points out and the appellants do not contest that the rule they argue for would entirely eliminate the requirement that lands must be valued as of the date of acquisition.

Moreover, it has been recognized that not only is the measure of recovery the date of acquisition by the defendant under clause (3), but it is also the date of acquisition under clause (4), *Nooksack Tribe* v. *United States, supra; Sac and Fox Tribe of Indians of Oklahoma* v. *United States, supra,* 315 F. 2d at 897, 161 Ct. Cl. at 199, and under clause (5). *United States* v. *Emigrant New York Indians, supra; United States* v. *Kiowa, Commanche and Apache Tribes, supra.*

Appellants' contention that claims involving payment of an unconscionable consideration asserted under clause (2) of section 2 of the Indian Claims Commission Act, are not the same as claims based solely upon unconscionable consideration under clause (3), lacks merit. We are of the opinion that a different rule of damages cannot be applied to a claim predicated upon payment of an unconscionable consideration which is cognizable under different clauses of section 2, merely by the caption affixed to the pleadings.

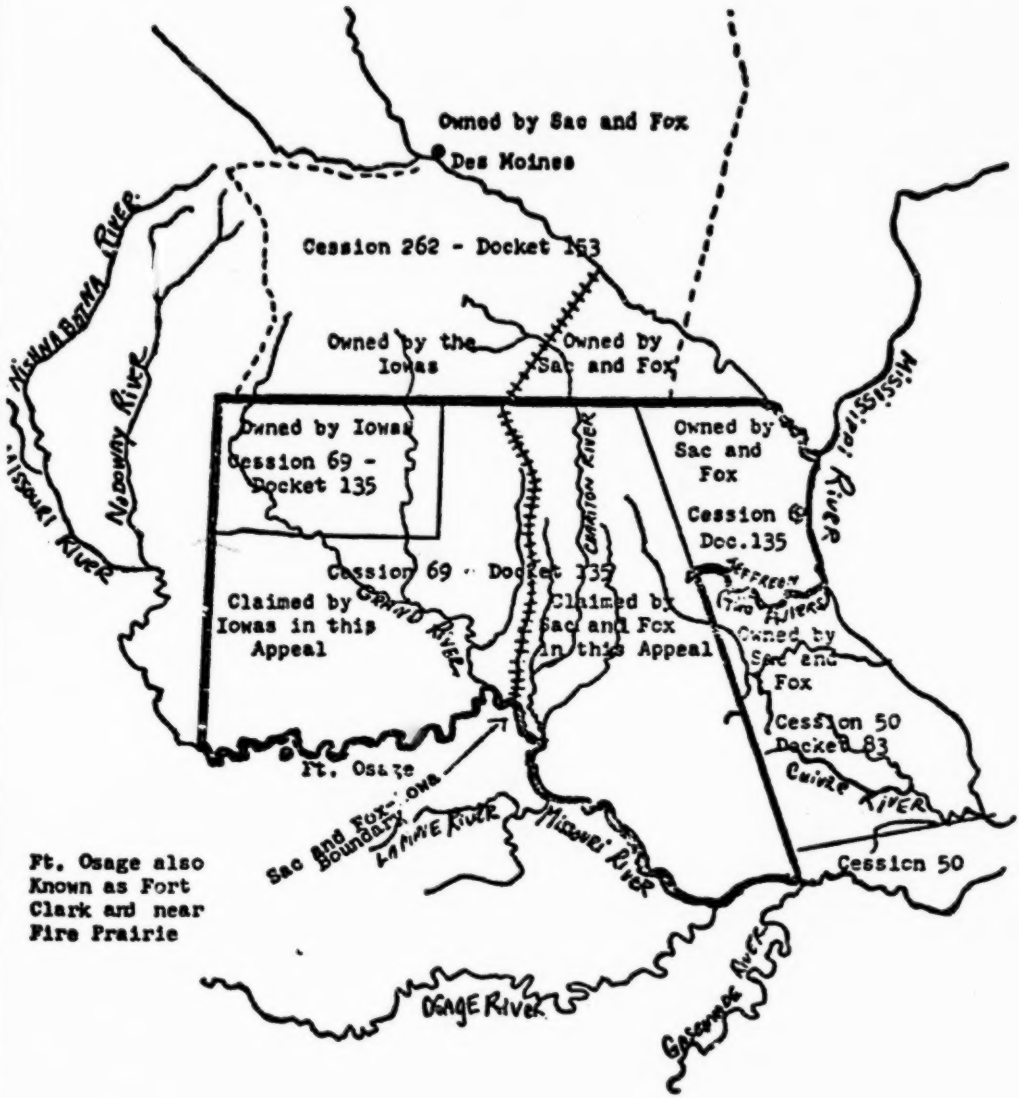
We are satisfied that our prior standard of recovery under the Act does not at all restrict the legislative objectives, indeed, the briefs of the appellants in the instant matter make no such argument. We are content, therefore, to rest upon the principles of stare decisis and legislative acquiescence in the judicial interpretation of statutes. See *United States* v. *South Buffalo Ry. Co.*, 333 U.S. 771, 774-75 (1948); *Electric Battery Co.* v. *Shimadzu,* 307 U.S. 5, 14, 59 S. Ct. 675, 83 L. Ed. 1071 (1939); *United States* v. *Elgin, J. & E. Ry. Co.,* 298 U.S. 492, 500, 56 S. Ct. 841, 80 L. Ed. 1300 (1936). To the extent that these principles afford a measure of stability and predictability in our legal system, they are of great value. Accordingly, the measure of

recovery to be accorded the appellants in the circumstances of this case is the fair market value of their Indian title lands at the date of acquisition by the defendant, less allowable offsets and payments already made as determined by the Commission.

The decision of the Indian Claims Commission is affirmed in part and reversed in part, as indicated in this opinion, and the case is remanded to the Commission for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded. [1002]

APPENDIX


Owned by Sac and Fox
Des Moines
Cession 262 - Docket 153
Owned by the Iowas
Owned by Sac and Fox
Owned by Iowas
Cession 69 - Docket 135
Owned by Sac and Fox
Cession 69 - Docket 135
Cession 50 Doc. 135
Claimed by Iowas in this Appeal
Claimed by Sac and Fox in this Appeal
Owned by Sac and Fox
Cession 50 Docket 83
Ft. Osage
Sac and Fox-Iowa Boundary
Cession 50
Osage River
Nishnabotna River
Nodaway River
Missouri River
Grand River
Chariton River
Mississippi River
Jefferson Lines
Two Rivers
Quivre River
Gasconade River
Ft. Osage also Known as Fort Clark and near Fire Prairie

BEFORE THE INDIAN CLAIMS COMMISSION

The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, the Iowa Tribe of the Iowa Reservation in Oklahoma, et al., the Sac and Fox Tribe of Indians of Oklahoma, the Sac and Fox Tribe of Missouri, and Sac and Fox Tribe of Mississippi in Iowa, et al.,

Plaintiffs,

v.

The United States of America,

Defendant.

} Docket No. 135

Decided: December 10, 1969

(22 Ind. Cls. Comm. 232)

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

The Commission has previously issued opinions in this docket on July 2, 1958 (6 Ind. Cl. Comm. 496) and August 29, 1963 (12 Ind. Cl. Comm. 487), justifying awards of $678,193.77 to the Iowa plaintiffs and $965,560.39 to the Sac and Fox plaintiffs as additional compensation for portions of the lands which the plaintiffs ceded to the defendant under the treaties of August 4, 1824 (7 Stat. 229, 7 Stat. 231). The additional compensation, which was subject to determinable offsets, if any, was for the portions of the ceded lands which the Commission found to be held by the plaintiffs under aboriginal title, *i.e.* Indian title, at the time the United States acquired the lands from France on April 30, 1803 as part of the "Louisiana Purchase" (8 Stat. 200), and so held by the plaintiffs until the cession treaties of August 4, 1824.

Specifically, the Iowa plaintiffs were found to have aboriginal title to the northwest portion of Royce Area 69, otherwise referred to as Cession 69, being those lands within the State of Missouri described within the following boundaries:

> Comencing on the present Missouri-Iowa line at a point which under the call in the Treaty of 1824 formed the "northwest corner of the state of Missouri" due east [233] along said line to the northwest corner of Putnam county, Missouri; thence due south following the western line of Putnam county and the western line of adjoining Sullivan county, Missouri to the southwest corner of Sullivan county; thence on a line due west to the southwest corner of Gentry county, Missouri; thence due north along the western line of Gentry county to the place of beginning. (Comm. Finding 15, 6 Ind. Cl. Comm. 464, 482)

Similarly, the Sac and Fox plaintiffs were found to have aboriginal title to the northeast portion of Cession 69, being lands within the State of Missouri described within the following boundaries:

> Commencing at a point corresponding to the northwest corner of that cession known as Royce 50 and proceeding north on that line which would form an extension of the western boundary line of Royce 50 to that point where such extension intersects the Missouri-Iowa line; thence east along said line to its intersection with the Des Moines River; thence following along the south bank of the Des Moines River to its confluence with the Mississippi river; thence down the west bank of the Mississippi to a point corresponding to the northeast corner of said Royce 50; thence west along the northern boundary line of Royce 50 to the place of beginning. (Comm. Finding 23, 6 Ind. Cl. Comm. 464, 493)

The plaintiffs appealed to the United States Court of Claims contending *inter alia*, that they held aboriginal title to more land than was awarded to them and consequently were entitled to larger awards; that the Commission erred in requiring proof of aboriginal title as of the 1803 date of the Louisiana Purchase instead of as of the 1824 treaty date; and that the land awarded to the Iowa should have been valued at 80 cents per acre instead of 45 cents (Appeal No. 9-65, 179 Ct. Cl. 8, 383 F. 2d 991, *cert. denied* 389 U. S. 900 (1967)). [234]

The matter is now before the Commission on remand from the United States Court of Claims which stated:

> We think the Commission committed error in refusing to consider the evidence of the tribes as to Indian title acquired by them between 1803 and 1824. Use and occupancy of a portion or of all of the land in question by them between these dates, especially when connected with use and occupancy immediately prior to 1803, could well have been use and occupancy "for a long time" and sufficient to constitute Indian title to the land.

> Accordingly, we remand this case to the Commission for its consideration of Indian title evidence between 1803 and 1824, so that it may determine from such evidence whether or not the land awarded to the Iowa or the Sac and Fox, or either of them, should be increased or changed in any way, and, if changed, to determine the change, if any, of the award to be made to them and to each of them, all in accordance with this opinion. (179 Ct. Cl. 8, 23)

The plaintiffs contend that immediately prior to the two treaties of cession on August 24, 1824, they had Indian title stemming from conquests and from exclusive use and occupancy of all of those lands officially designated as Royce Area 69 (sometimes referred to as Cession 69). The entire area lay within the limits of the States of Missouri, bordered on the west by a line running from a point on the Missouri River at the mouth of the Kansas River, north 100 miles to the northwest corner of the State of Missouri; from thence along the northern border of the State of Missouri east to the Des Moines River; thence southeast along the south bank of the Des Moines River to its confluence with the Mississippi River; thence south along the west bank of the Mississippi to a point corresponding to the northeast corner of Royce Area 50 at the mouth of the Jeffreon River [235] (otherwise known as the North River); thence west up the Jeffreon River (along the northern boundary of Royce Area 50) to a point thereon thirty miles from its mouth; thence southeast along a line from that point to a point on the Missouri River at the mouth of the Gasconnade River; thence westerly along the Missouri River to the point of beginning. 6 Ind. Cl. Comm. 464, 465, 466.

The Iowa Tribe claims to have owned all the land in this area west of the watershed between the Grand and Chariton Rivers, and the Sac and Fox Tribe claims to have owned

all of the land in the area east of that watershed. The plaintiffs contend that the territorial boundaries which they assert in this suit were well defined and were recognized by other tribes "from aboriginal times down to 1824."

The defendant contends that those portions of Cession 69 which the Commission previously found were not held by plaintiffs under Indian title when the United States purchased the area from France on April 30, 1803, were not used or occupied by any Indian tribe and became part of the public domain in which no Indian tribe could thereafter acquire aboriginal title, such title not being one that may be established as against the United States by trespass or adverse possession. Defendant urges that the plaintiffs in order to prevail must not only establish that they had aboriginal title as of 1803 but that they reasonably maintained such ownership until the treaties of cession were negotiated in 1824.

In accordance with the order of remand of the Court of Claims the Commission has carefully reviewed the evidence of Indian use and [236] occupancy of Royce Area 69 between 1803 when the land was purchased from France and 1824 when the plaintiffs ceded all their rights to this land to the United States, to determine whether or not the record justifies the Commission in finding that either or both plaintiffs exclusively used and occupied for a long period of time prior to 1824 more land in Cession 69 than was credited to them in the Commission's previous decision. After examining the record with particular attention to the matters pointed out by the Court of Claims in its decision on remand and after considering the new briefs and oral arguments of the parties, the Commission concludes for reasons which will be discussed in detail that the plaintiffs have not met their burden of proving actual, exclusive and continuous use and occupancy of additional lands for a long

period of time prior to 1824 and that the areas of land credited to the plaintiffs in our previous decision should not be changed in any way.

The Commission makes no additional findings of fact. Instead for the most part we shall limit our discussion to evidence previously alluded to, especially that cited by the plaintiffs in their appeal brief before the Court of Claims. As will be explained herein, said evidence does not provide a basis for the conclusions which the plaintiffs would have us make.

Indian Title

To establish Indian title under the Indian Claims Commission Act, the Iowa plaintiffs and the Sac and Fox plaintiffs each must prove by a preponderance of the evidence that their forebearers had [237] actual exclusive and continuous use and occupancy of their respectively claimed areas for "a long time" prior to August 4, 1824 when they ceded Cession 69 to the United States. While we are of course dealing essentially with a question of fact, the elements thereof which must be proved have legal connotations which we will comment on herein.

Indefinite Early Territorial Claims and Boundaries

In order for the plaintiffs to prevail, the sum total of the evidence must establish (or be subject to a reasonable inference), *inter alia,* that each plaintiff exclusively used and occupied a definite area. Some general boundary lines of the exclusively occupied territory must be shown. *The Quapaw Tribe of Indians* v. *United States,* Dkt. 14, 1 Ind. Cl. Comm. 469, 481 (1951), reversed in part and remanded on other grounds, 128 Ct. Cl. 45 (1954). Proof of Indian title may fail where the territory claimed by a plaintiff's ancestors circa the date of taking was but vaguely defined, was

the subject of conflicting claims of other tribes, and appeared to differ substantially from the territory claimed by the plaintiff.

In the instant case, during the period from April 30, 1803 to August 4, 1824, the Sac, Fox and Iowa Nations and neighboring Indian tribes claimed diverse tribal territories, the locations and boundaries of which were for the most part contradictory, vague, indefinite, unknown, or undefined. To the extent that boundaries to territory which the plaintiffs' ancestors claimed at that time (as distinguished [238] from the boundaries which the plaintiffs claim in this suit) may be ascertained, it appears that such territory included the northeast corner of Cession 69 (credited to the Sac and Fox by Commission Finding 23, herein), Cession 50 (which will be discussed more fully herein), and land to the north, northwest, and northeast of Cession 69.

William Clark, Superintendent of Indian Affairs, wrote on January 5, 1837 that upon his arrival in Upper Louisiana 34 years previously, *i.e.*, in 1803, he found the Iowa:

> . . . in possession of an immense tract of country between the Mississippi and Missouri rivers, their claim to which so far as my knowledge extends, was undoubted and unquestioned, and which they have never abandoned, living on it from that time to the present. (Iowa Ex. 152)

This statement was accepted by the Commission as evidencing that the Iowas, (in common with the Otoe and Missouria, the Omaha, and the Sac and Fox) occupied Cession 151 in the western portion of Iowa to the northwest of the area in suit. (Findings 12 and 52, Dockets 11-A and 138, *Otoe and Missouria Tribe of Indians* v. *United States* and the *Iowa Tribe of Reservation Indians In Kansas And Nebraska, et. al.*, 5 Ind. Cl. Comm. 136, 322-23 (1957), 13 Ind. Cl. Comm. 272, 274 (1964))

Captain Meriwether Lewis' 1806 report on Indian Nations inhabiting the Territory of Louisiana located the "Ayouwais" (Iowa) 40 leagues up the river "Demoin" (Des Moines), which was in Iowa north of Cession 69. Lewis states that the Iowa

> . . . are the descendants of the ancient Missouries, and claim the country west of them, to the Missouri; but, as to its [239] precise limits, or boundaries between themselves, and the Saukees and Foxes, I could never learn (Sac and Fox Ex. 30, p. 7. See to same effect Lewis and Clark's 1805 account, Def. Ex. 114, pp. 20, 31, Def. Ex. 9, pp. 2, 3, and Comm. Finding 69(c) herein, 6 Ind. Cl. Comm. 464, 479, 480)

Lewis reported that the Saukees (Sacs) and Renars or Foxes:

> . . . formerly resided on the east side of the Mississippi, and still claim the land on that side of the river, from the mouth of the Ouisconsin to the Illinois river, and eastward towards lake Michigan, but to what particular boundary I am not informed; they also claim, by conquest, the whole of the country belonging to the ancient Missouries, which forms one of the most valuable portions of Louisiana; but what proportion of this territory they are willing to assign to the Ayouwais, who also claim a part of it, I do not know. As they are at war with the Sioux, who live N. and N.W. of them, except the Yankton Ahnah, their boundaries in that quarter are also undefined . . . (*Id.*, p. 4)

He reported that the Missouries:

> . . . are the remnant of the most numerous nation inhabiting the Missouri, when first known to the French. Their ancient, and principal village, was situated in an extensive and fertile plain, on the north bank of the Missouri, just below the entrance of the Grant [Grand] river. Repeated attacks of the small pox, together with their war with the Saukees and Renars, have reduced them to their present state of dependence

> on the Ottoes, with whom they reside, as well in their village as on their hunting excursions . . . These people are the real proprietors of an extensive and fertile country, lying on the Missouri, above their ancient village, for a considerable distance, and as low as the mouth of the Osage river, and thence to the Mississippi. (*Id.*, p. 9)

Similarly he stated that the Ottoes "have no idea of an exclusive possession of any country, nor do they assign themselves any limits," and that the limits of the country claimed by the Kansas was unknown. (*Id.*, pp. 11, 17) [240]

Following his expeditions to the sources of the Mississippi and through the western parts of Louisiana in 1805-1807, Major Zebulon Pike recorded:

> The Iowas reside on the De Moyen and Iowa rivers in two villages . . . their wars and alliances are the same as those of the Sauks and Reynards, under whose special protection they conceive themselves to be . . . Their residence being on the small streams in the rear of the Mississippi, out of the highroad of commerce, renders them less civilized than those nations.
>
> The Sauks, Reynards, and Iowas, since the treaty of the former two with the United States [in 1804], claim the land from the entrance of the Jauflioni, on the W. side of the Mississippi, up the latter river to the Des Iowa, above Prairie Des Chiens, and westward to the Missouri; but the limits between themselves are undefined. (Sac and Fox Ex. 136, Iowa Ex. 25)

With the exception of the portion of the Des Moines River near its mouth, which borders the northeast portion of Cession 69, the Des Moines and Iowa rivers are situated principally in Iowa, to the north of Cession 69.

"Jauflioni" is one of several names apparently applied to the Jeffreon River (also known as the Two Rivers, Jeffison River, Jefferson River and the North River) which

forms the north boundary of Cession 50 and the south boundary of the northeast corner of Cession 69 (*cf.* Def. Exs. 115, 116). In the early 1800's there was great confusion and discord over which of the various rivers actually marked the boundary, as well as which name should be applied to the boundary stream. On June 14, 1812 Governor Benjamin Howard wrote from St. Louis to the Secretary of War: [241]

> I must apprize you of a question, which now exists between the United States and the Sacs & Foxes, under the treaty as it respects the river Jefferson, made one of the boundaries, I have taken much pains to ascertain the river, to which this name properly belongs, but such is the diversity of the opinion on this subject, that it is impossible to decide, indeed it is urged by some that it empties into the Mississippi on the East side. The Indians, contend that the two rivers, about 15 miles above Fort Mason, is the boundary under the call, for the Jeffreon, some say that a stream called now, the Fabion, has borne the name by a few it is said that the Wyaconda is the river, so that it is a question unsettled, and difficult to decide. (Sac and Fox Ex. 42.)

Similarly on January 8, 1822 William Clark wrote to the Secretary of War:

> The River Jeffison called for, as the Treaty is not known (a small lake is only known by that name) though it is believed that one of the rivers called the Two Rivers, is the one intended in the calls of the Treaty. (Sac and Fox Ex. 78; *cf.* Sac and Fox Ex. 91)

It is apparent from the map exhibits, *e.g.*, Iowa Ex. 183 and Def. Exs. 115, 116, that the Missouri River rises far to the northwest of Cession 69 and flows through South Dakota and southward between Nebraska and Iowa, all to the northwest of Cession 69. and thence southeasterly between Kansas and Missouri to the west of Cession 69, and thence eastward along the southern border of Cession 69,

and finally to the southeast of Cession 69 until it flows into the Mississippi. The latter river forms the eastern boundary of the northeast corner of Cession 69 but also flows to the southeast of Cession 69 and ascends to the northeast thereof.[1] [242]

It would thus appear that Pike's 1805-1807 description, *supra,* would place the Sac, Fox and Iowa principally to the north of Cession 69, in Iowa, and also in the northeast corner of Cession 69 (which the Commission in its Finding 23 herein, credited to the Sac and Fox).

On January 6, 1814 Governor Clark wrote to the Secretary of War that about 400 families of whites [2] were settled on the northwest side of the Missouri river on lands claimed by the "Socks and Ioways". (Sac and Fox Ex. 43) Although it is impossible to tell from this whether the land in question was in Cession 50 or Cession 69, counsel for plaintiffs argue that it was near the mouth of the Grand River and hence in Cession 69. (1958 Tr. 69) [243]

[1] *Cf. Citizen Band of Potawatomi Indians of Oklahoma* v. *United States,* Dkt. 146, 6 Ind. Cl. Comm. 442, 459 (1958), wherein an anthropologist's location of Chippewa Indians within a cession area based [242] upon the location of members of the tribe on annuity rolls of a much later date and upon references to them along the Grand River (not to be confused with the Grand River in the instant case) which passed through the cession area but also extended far east of that area was held to be speculative and far short of that degree of positive or convincing proof of use and occupancy, control or possession essential for Indian title.

[2] The theory that settlement and occupancy of land by whites, *viz.,* Spanish, prior to Indian occupancy, or ejection of Indians from their tribal lands by whites, operates in law to deprive Indians of possessory rights in the land has been previously postulated but rejected by the Commission on the facts without comment on the theory. *The Jicarilla Apache Tribe of the Jicarilla Apache Reservation, New Mexico* v. *United States,* Dkt. 22-A, 12 Ind. Cl. Comm. 439, 481 (1963). However, the fact that Indians were greatly outnumbered in an area by Spaniards is not proof that the Indians could not have held exclusive occupancy against the Spaniards where lands claimed by the Indians were mountainous and unfit for farming or sheep herding and therefore not preferred by the Spanish and probably not used by them. *Pueblo of Taos* v. *United States,* Dkt. 357, 15 Ind. Cl. Comm. 688, 697-698 (1965); *Pueblo of Nambe* v. *United States,* Dkt. 358, 16 Ind. Cl. Comm. 408, 420-421 (1965). [243]

On February 3, 1819, George C. Sibley, the agent in charge of Fort Osage, wrote to Governor Clark from Fort Osage concerning claims by two Iowa chiefs to lands northeast of the Missouri which were ceded to the United States by the Osage. Although Sibley confesses himself to be an advocate of the "Ioways" in the matter, he states:

> The claims of our Indian Tribes to lands are so extremely vague and undefined, so conflicting and intermixed, that I cannot conceive a much more difficult task *than to assign to each Tribe its proper limits* . . .
>
> Perhaps it would be just to say, that the forests and wilds of the Missouri belong in common to those Nations of Indians who live contiguous to them, and Hunt thro' them. And that when our Govt. thinks proper to reclaim those wilds for the use of our People, remuneration ought to be made in common to those Tribes whose natural pursuits are thus interfered with . . . (Sac and Fox Ex. 67, and Comm. Finding 13(d) herein, 6 Ind. Cl. Comm. 464, 480)

In November, 1820, Major Morrell Marston at Fort Armstrong located in Iowa on the west bank of the Mississippi River just above Rock Island, stated of the Fox:

> They claim a large tract of country on the west of the Mississippi: it commences at the mouth of the upper Iowa River, which is above Prairie du Chien and follows the Mississippi down as far as Des Moine River and extending back towards the Missouri as far as the dividing ridge, and some of them say quite to that River—. (Def. Ex. 51, p. 147; Sac and Fox Ex. 137)

This area would include the east half of the northern edge of Cession 69 and the area north of Cession 69.

On February 20, 1821, William Clark wrote to Secretary of War, John C. Calhoun: [244]

> A short time past I received a communication from the Sock Tribe asserting a title to a tract of country west of the Mississippi extending as low as the two River about fifty miles below the Demoin. This claim of the Socks is derived from the same source with that of the Potowatomies to the lands ceded by the Kickapoos in their late Treaty; tho' in my opinion not equal, as this tract which the Socks claim was used as a hunting country by the French & Spanish[3] hunters from this town ever since the fall of the Illinois Nation, and I am informed was considered as in possession of the white people. In fact the Ioways have quite as good a claim to those lands as the Socks, as all their pretensions derives from hunting on them. (Sac and Fox Ex. 70)

On September 26, 1821, Indian agent Thomas Forsyth stated in a letter from Fort Armstrong at Rock Island, Iowa to the Secretary of War:

> The Sauk and Fox Chiefs called on me sometime ago, and enquired what land I considered to be theirs. I informed them, that, I always understood that their land commenced at the mouth of the River de Moine and continued upwards opposite the Pirarie des Chien. The Chiefs said, up to Ihowai River above Pirarie des Chien, and enquired of me, who the United States purchased the land from lying between the mouth of the Two Rivers and River de Moine. To this Question I could give them no information. A few days afterwards, the same Chiefs with many of their Braves called and requested me to write a letter to the President, which they would dictate and sign, which letter I enclose you herewith for your information. The land in question, I know nothing about it if sold to the United States, I never heard what Indians sold it was as the Sauks and Foxes declare they never sold it. (Sac and Fox Ex. 74, and 1958 Tr. 87-88)

It is apparent that Forsyth considered the Sac and Fox southern boundary to commence at the mouth of the Des Moines River (in Cession 120) and that their land extended northward from there into Iowa opposite Prairie du Chien,

[3] See note 2, supra.

which is on the Mississippi at the mouth [245] of the Wisconsin River, and well above the Iowa River. The chiefs apparently felt that it extended still further north to the Upper Iowa River.

In his letter of January 8, 1822 to the Secretary of War, William Clark stated:

> The Sacks & Foxes differ as to their boundaries, claiming much higher up the Mississippi than they have a just title to, and lower down that river, than many believe they should claim. . . .
>
> As relates to the claim of the Sock & Fox Tribe to the Country west of the Mississippi, and below the River des Moines. I have been always inclined to believe that they had no just claim. That tract of country it appears was used in the time of the Spanish government as a hunting country by the inhabitants of this town and the neighboring villages; and it is also stated by some of the oldest inhabitants of this country that the Little Osage extended their hunting excursions to the Bank of the Mississippi after the Michigamees (a tribe of Illinois) abandoned the country; and not until the latter years of the Spanish government, did the Sacks, Foxes, and other tribes occassionally hunt in that tract of country.
>
> I have been under the impression that Gov. Harrison intended, by commencing the boundary line at the mouth of the Gasconade and extending it to the Jeffreon (in the extinguishment of the Sacks & Foxes claim by treaty entered into the 3rd Nov. 1804) to give full effect to the Laws, in cases of Indians depredation; a portion of the country within those bounds, having been settled at the time; yet if the Indians' hunting occasionally within the country, authorized them to claim, it would appear that the Osage, Ioways, & Kickapoos have pretentions. (Sac & Fox Ex. 78)

It appears that the above described territory principally encompasses Cession 50 and the northeast corner of Cession 69 (credited to the Sac and Fox by Commission Finding 23 herein), and the land to the north of Cession 69 in Iowa. [246]

On December 8, 1823 Clark again wrote to Secretary Calhoun about quieting the Sac, Fox, and Iowa claims to the northeast corner of Cession 69. Reiterating his opinion that such claims were unjustified and commenting on the ambiguity of the southern boundary of the claims, he stated that the Sac and Fox claims were:

> . . . for lands within this State & below the River des *Moin—which I had not considered* them justly entitled to; for reasons stated in a letter which I had the honor of addressing to you the 8th of Jany. 1822, in which I took the liberty of suggesting the expedient of quieting their claim & also the claim of the Ioways to the lands in question, (which are situated between the des Moin River and a river called Jeffreon, which is not known but supposed to be one sixty miles below the Des Moin) . . . (Sac and Fox Ex. 91)

It is evident from the above passages that during the period from April 30, 1803, to August 4, 1824, the Iowa and the Sac and Fox, far from maintaining separate and well defined territorial claims, for the most part voiced conflicting, overlapping and contradictory claims to the same ill-defined territory which appears to have included Cession 50 (to the southeast of the land in suit), the northeast corner of Cession 69 (credited to the Sac and Fox by Commission Finding 23, herein) and the land to the north, northwest and northeast of Cession 69.

The primary goal of the Treaty of August 19, 1825 (see Iowa Ex. 94) and of the Council of Prairie du Chien on July 7-16, 1830 (see Iowa Ex. 115) was to establish or clarify tribal boundaries and to put an end to internecine inter-tribal warfare over boundary disputes. Although Article 3 of the Treaty of Prairie du Chien of August 19, [247] 1825 provided that boundaries would be designated between the Iowa and the Sac and Fox, this provision was not complied with. (Iowa Ex. 135, 1958, Tr. 14, 15)

Iowa Use and Occupancy: 1803-1824

Iowa Villages:

In its Opinion, the United States Court of Claims states:

> The record is replete with evidence that during the period from 1800 to 1824, the Iowas hunted over the entire western part of Area 69 (Cession 69) extending from the watershed between the Grand and Chariton Rivers on the east to the Missouri, Nodoway and Nishnabotna Rivers on the west, and from the Des Moines River on the north to the Missouri River on the south. Much of the evidence indicates they had villages scattered throughout this area during this period, although some of them were moved about from time to time. By 1800, they had driven the Missouria, Osage and Kansas Indians out of this entire territory and were in complete control of the land north of the Missouri River.

and inferentially, that following the War of 1812 the Iowa did not return to their old Des Moines River site until 1820. (179 Ct. Cl. 8, 14-15) As we shall illustrate, these statements are not substantiated by the record as a whole.

There is no evidence showing an Iowa village in Cession 69 prior to 1812. The evidence establishes that the principal Iowa villages from 1803 to 1812 were on the Des Moines and Iowa Rivers, north of Cession 69.

Thomas Anderson, a British trader, reported in 1801-1802 that he ascended the Des Moines about 50 miles to the "Ioway" tribe. (Iowa Ex. 18 and Finding 10(a), 6 Ind. Cl. Comm. 464, 471; *cf* Tr. 23, 303, 314) [248]

In 1804 and 1805 the main Iowa village was reported by Lewis and Clark to be 40 leagues up the Des Moines River from its junction with the Mississippi. (Def. Ex. 9, p. 2; Def. Ex. 114, p. 11; Finding 10(a), 6 Ind. Cl. Comm. 464, 471; and Tr. 306) Defendant's expert, Dr. Gussow, equates this distance to 200 miles (Def. Ex. 114, p. 11), whereas

plaintiffs' expert, Dr. Wallace, equates it to 120 miles. (Tr. 23, *cf.* Def. Ex. 21) These experts also credit Lewis and Clark with reporting the village as being located only 36 leagues up the Des Moines, which Dr. Gussow equates to 108 miles. (Def. Ex. 114, p. 11, Tr. 306-307) Dr. Wallace testified that the 36 and 40 league distances would place the village at or slightly above Selma, Iowa (Tr. 306-307), and that this remained the main Iowa village until 1823. (Tr. 61-62)

From 1800 to about 1805 there were two Iowa villages in Illinois, one opposite the mouth of the Des Moines River, and one opposite the mouth of the Iowa River where these rivers flow into the Mississippi. (Tr. 22, 61, 207 and Findings 10, 10(c), 6 Ind. Cl. Comm. 464, 470, 472) Plaintiffs' expert, Dr. Wallace, testified to the effect that these villages were founded about 1765 (Tr. 22), and that for a short time, probably after 1800, there were Iowa villages on both banks of the Mississippi opposite the mouth of the Iowa river. (Tr. 207)

Dr. Wallace also testified concerning "an allusion to an Iowa village or Iowa living on the upper waters of the Chariton River" in 1804, which he considered would be in Cession 69 (albeit in the portion thereof claimed by the Sac and Fox plaintiffs), but stated he [249] didn't consider the reference close enough in time or substantial enough to be included, and that he was not convinced that there was actually a village there at the time. (Tr. 96)

In 1807 Pike reported the Iowa residing "on the De Moyen and Iowa rivers in two villages" one of which was "about 10 miles up the Iowa river on its right bank." (Def. Ex. 18, p. 339; Def. Ex. 114, p. 9; Iowa Ex. 30; Finding 10(c), 6 Ind. Cl. Comm. 464, 473; *cf.* Tr. 207, 307-308) The Rev. John Todd, in his book of recollections, stated that

in the beginning of the nineteenth century the Iowa had a village "on the right bank of the Iowa river, about ten miles above its confluence with the Mississippi," and another "which was their principal village, on the Des Moines river on the site of Iowaville in Van Buren county." (Def. Ex. 19, Def. Ex. 114, p. 9)

During the War of 1812 the United States invited the Iowa, Sac, and Fox to move to temporary settlements on the Grand, Osage, and Lamine Rivers, in order to remove them from British influence and to prevent them from becoming allies of the British. (Tr. 31, 138, 139; Finding 11, 6 Ind. Cl. Comm. 464, 473) The differences between the Iowa and the Sac and Fox, which were to culminate in bloodshed in 1819, began during this period over divided alliances with Britain and America. (Tr. 315) Some of the Iowa moved to the Grand River, "north of the Missouri" about 1813. (Tr. 139, 31) Inasmuch as the major forks of the Grand River all originate in Iowa, not only north of the Missouri, but north of Cession 69, it is impossible to state with any certainty what portion of the Grand River or its forks such [250] vague reference may apply to or even whether such settlement was within or north of Cession 69.* The bulk of the group which moved to the Grand River at this time returned to the Des Moines River village after the war. However, there is some reason to believe that at least a portion of the Iowa who moved to the Grand River during the War of 1812, settled in a small village near the mouth of the Grand River where some of them remained until about 1816. (Tr. 32, 170-171, 209, 251, Iowa Ex. 52) The Osage and Lamine Rivers, and the settlements thereon, lay south of Cession 69.

The *Missouri Gazette* of February 19, 1814 informed its readers:

* See note 1, *supra*.

> The Sacks, Foxes and Ioways are with the United States Factory agents on Grand river and on the south side of the Missouri. (Iowa Ex. 44, and Plaintiffs' 1968 Brief, p. 41; Tr. 176)

Although the plaintiffs' expert, Dr. Wallace, interpreted this as evidencing "some sort of settlement" (Tr. 251), the defendant's expert, Dr. Gussow, with greater reason, testified that it merely meant that the Iowas were at the trading post. (Tr. 422) The presence of the Sac and Fox on the Grand River at any rate tends to refute the claim of the Iowa plaintiffs to exclusive use and occupancy of that area.

William Russell, in writing to the Secretary of War from St. Louis on December 4, 1814, stated that he had just returned from a military excursion up to the Missouri as high as Grand River with four companies of rangers in pursuit of a considerable number of [251] hostile Indians (tribal identity undisclosed) believed to be from Rock River and reported to be in the vicinity of the forts at and near the Boone's Lick settlement, and that he had "struck the grand river nearly opposite to where the Ioways reside, but they being considered friendly disposed towards our government," he dared not interrupt them. (Iowa Ex. 45, Tr. 248) The Boone's Lick settlement was within Cession 69 along the Missouri a short distance down stream from the mouths of the Grand and Chariton rivers. It would thus appear that in December, 1814 there was an Iowa camp or village near the mouth of the Grand River in Cession 69.

Schoolcraft's map, drawn from a map (not in evidence) drawn in 1848 by an old Iowa Indian, shows undated and unverified locations of Iowa villages including a village on the west bank of the Grand River some distance above its mouth, a village much further up the Grand River, and two villages on the Chariton River, one near its mouth and one near its head. (Iowa Ex. A, Tr. 419-421) This

evidence may not be given great weight in establishing Iowa occupancy during the subject period.

On September 20, 1815, William Clark sent a list of Indian tribes to the Secretary of War, showing among the numerous tribes residing or roving on the Missouri, 1000 "Ioways," "on the Missouri and Grand rivers." (Iowa Ex. 48, Tr. 428) The ensuant 1816 War Department list of tribes also showed 1000 "Ioways," and under the heading "places where the tribes reside or rove," specified "on grand [252] river near the settlement and a village on Lemoin" (Des Moines). (Iowa Ex. 52, Tr. 429-431, Plaintiffs' 1968 Brief, 41) The same list shows a Sac village and a Fox village on the Grand River, evidencing that the Iowa usage of that portion of Cession 69 was not exclusive at that time.

A few of the Iowa who left the Des Moines area during the War of 1812 went with Chief Hard Heart, about the year 1812, to join the Otoe and Missouri on the Platte River west of Missouri. Many more of Hard Heart's followers joined him there in 1818 and 1819. Some of this group returned to the Des Moines River in 1820 although some were still with the Otoe in 1822. (Tr. 319, 320; Def. Ex. 114, p. 12; Finding 11(c), 6 Ind. Cl. Comm. 464, 474)

An 1815-1816 sketch map of portions of Missouri and Iowa at the close of the War of 1812 (Def. Ex. 113) shows an Iowa village some distance up the *west fork* of the Grand River and another Iowa village on the Des Moines. Although the map is distorted, making it impossible to accurately locate the villages on modern maps, it is most probable that the village on the west fork of the Grand was located north of Cession 69, or possibly within the portion of Cession 69 credited to the Iowa plaintiffs by Finding 15 herein, 6 Ind. Cl. Comm. 464, 482. The map does not establish the size of the village nor its dates of occupancy.

Plaintiffs' expert, Dr. Wallace, testified, without documentary reference, that from approximately 1813 to 1819 approximately half of the Iowa lived in a village on the west fork of the Grand River roughly [253] somewhere about Albany, Missouri (Tr. 132, 207, 208, 250), which is at the junction of the *east* and *west* forks of the Grand River, in the portion of Cession 69 credited to the Iowa plaintiffs by Finding 15 herein. It appears that Dr. Wallace based this testimony in part upon Def. Ex. 113, *supra.* (Tr. 161-165)

It also appears that Dr. Wallace's testimony was based in part upon Iowa Ex. 108. (Tr. 137, 138, 166) Iowa Exhibit 108 is a letter dated *October 11, 1829* from General Hughes to William Clark concerning Hughes' pursuit and capture of Big Neck and sixty-five Iowas, some of whom had apparently been involved in a battle in which white citizens had been killed in Missouri in *July, 1829.* The passage relied upon by Dr. Wallace is Hughes' statement that he started the pursuit from his post at the "Ioway" village (somewhere on the Missouri) and ultimately

> . . . struck the *North* fork of Grand river on which, we had reasons to believe the Big-Neck had planted corn last spring, we found an *Indian Village about 25 miles above the old Ioway village,* but there were no marks of its late occupancy * * *. (emphasis added)

There is nothing in Iowa Exhibit 108, including the above quoted passage, to establish that the "Indian Village" was an Iowa village, that it was located within Cession 69,[5] or that it was built or occupied by half of the Iowa tribe or prior to the 1824 cession date. *A fortiori* this passage, which speaks of a village on the "North fork" of the Grand, does not support Dr. Wallace's testimony that half of the Iowa resided on the *west* fork of the Grand within Cession 69 from

[5] See note 1, *supra.*

1813 to [254] 1819. (Nor does the passage establish that the "old Ioway village" was in Cession 69 or occupied prior to 1824.) General Hughes subsequently located Big Neck's abandoned village "on the head branches of the Two-rivers" and ultimately captured Big Neck, who was accompanied by Pumpkin Chief, on the plains between the Flint and Iowa Rivers in northeast Iowa. (Iowa Ex. 108, pp. 2, 3) There is no evidence that the Two-Rivers village was built prior to the 1824 cession date or that it was located within Cession 69. If it was located within Cession 69, it would have been within the portion thereof presently claimed by the Sac and Fox plaintiffs, and to which the Iowa plaintiffs do not claim, and hence in derogation of the Sac and Fox claim.

Dr. Wallace's testimony appears also to have been based in part upon Sac and Fox Ex. 112, a November 14, 1829 letter from William Clark, Superintendent of Indian Affairs, to the Secretary of War, stating that the Iowa battle *of July 17, 1829* had taken place 18¼ miles within Missouri in Randolph County. (Tr. 187) The letter makes no mention of an Iowa village.

It appears that, in testifying, with apparent reference to the above quoted passage from Iowa Ex. 108, Dr. Wallace reversed the position of the two villages in time and location, and confused the leadership of Pumpkin and Big Neck. He states that in pursuit of Pumpkin's band:

> Hughes, the Indian agent for the Iowa, traveled across the northern portion of Cession 69 within the State of Missouri, and describes the *old abandoned village above the more recently lived-in Iowa village* on the Grand. (Tr. 138—emphasis added) [255]

By the latter village, Dr. Wallace referred to a village allegedly built in 1823 and indicated by the red dot on Iowa Ex. 183. Dr. Wallace thus locates the "more recently lived-in" 1816 Iowa village from Def. Ex. 113, not only on the west

fork of the Grand River near Albany, but *also below* the ruins of the old Iowa village built in 1823 on the erroneous presumption that it was the village Hughes actually described as 25 miles *above* the old Iowa village. A comparison of Iowa Ex. 183 with Def. Exs. 115, 116, discloses that while Dr. Wallace states that the 1823 red dot village is located on the north fork of the Grand River, the stream it is located on is shown as the Thompson River on Iowa Ex. 183 and Def. Ex. 116. It is decidedly east of the west and east forks of the Grand. The Commission takes judicial notice however, that the stream is designated as the Grand River in the *Bureau of American Ethnology Eighteenth Annual Report,* Pl. CXXXI, Royce 262, Iowa; and Pl. CXLIV, Royce 69, Missouri (1899).

Defendant's expert, Dr. Gussow, interpreted Def. Ex. 113 as locating the 1816 Iowa village on the west fork of the Grand, to the north of Cession 69 as indicated by the encircled X on Def. Ex. 115. (Tr. 388-394)

There is some evidence that by 1815 the main Iowa village was again located on the Des Moines River north of Cession 69, and that part of the tribe was settled even further north in a village on the Upper Iowa River. (Def. Exs. 99 and 114, p. 9; Tr. 311-312 [256]

By 1816 the tribe had become further divided over alliances with Britain and America and the Des Moines Village was starting to break up. (Tr. 316; Finding 11(b), 6 Ind. Cl. Comm. 464, 474)

On November 4, 1816, William Clark, as Governor of Missouri Territory, stated in an official report that the Iowa were "on the Grand River" and also had a village on the "Lemoin" [Des Moines]. (Def. Ex. 5, pp. 256 and 114, pp. 11-12; Tr. 316) It is problematical whether this statement should be interpreted as meaning that the Iowa had a

village on the Grand River at that time, and if so, whether it was within Cession 69, and whether it was newly established at that time or was one of the earlier villages still occupied or reoccupied. It is possible, and not inconsistent with other evidence, that these Iowa were at the aforementioned Iowa village at the mouth of the Grand River.

Defendant's expert, Dr. Gussow, apparently interpreted Clark's report however as meaning that a new Iowa site was established at some unknown spot on the Grand River at this time. (Tr. 316) He admitted the possibility of Iowas residing toward the mouth of the Grand River from 1816 to 1818 (Tr. 439), but testified that they had moved back to the Des Moines by 1818. (Tr. 318) The latter statement finds support in a July 2, 1818 letter from Thomas Forsyth, the Indian Agent at Fort Armstrong at Rock Island, Iowa, to William Clark, stating that Mr. Stephen Julian, the government interpreter for the "Ihowai" had informed him that *all* of the Iowa were at their old village 120 miles up the Des Moines River. (Iowa Ex. 56, Tr. 318, 541) In partial [257] conflict with Dr. Gussow's testimony, *supra*, and the Forsyth letter is the following statement by Dr. Gussow in his report on the Iowa:

> Another small group settled near the mouth of the Grand river in about 1816 and was *joined by the main body of the tribe in 1823.* (Emphasis added) (Def. Ex. 114, p. 22)

All of these statements of Dr. Gussow are in apparent conflict with his later testimony that the settlements at the mouth of the Grand River were white settlements with Iowa Indians residing with the whites and that he didn't think there were any Iowa villages in Cession 69 before 1823. (Tr. 539, 540)

In 1817, Stephen Long, a government engineer who traveled up the Mississippi, reported that the principal part of the "Ioway" reside up the "river De Moyen" 120 miles from its mouth. (Def. Exs. 21 and 114, p. 11; Iowa Ex. 139, pp. 52-53; Tr. 317, 318) Edward Tanner, who also allegedly journeyed up the Mississippi in 1817, placed the tribe 100 miles from the west side of the Mississippi on the "Menomonee" River. (Def. Exs. 5, p. 257; 25, p. 288; 114, p. 11) Dr. Gussow states that the Menomonee reference was in error and should have been to the Des Moines. (Def. Ex. 139, pp. 52-53) Long also allegedly reported a few Iowa living in the neighborhood of Four Lakes, about 300 miles up Rock River in Wisconsin. (Def. Ex. 114, pp. 9-10)

During the early part of 1819 the bulk of the Iowa were north of Cession 69 at the Des Moines River village 40 leagues up the Des Moines. (Tr. 28) A few Iowa were residing still further north, on the Mississippi toward Prairie du Chien, Wisconsin or on the Upper [258] Iowa (Tr. 314), with the Sac toward the mouth of the Des Moines in Cession 120 (Tr. 312, 314), and at Fort Edwards which was east of Cession 69 on the east side of the Mississippi three miles below the foot of the Des Moines rapids. (Def. Exs. 18, p. 14; 109, p. 5; and 114, p. 10)

Following a serious dispute with their erstwhile Sac and Fox allies about mid-1819, the Iowa reportedly abandoned their residence on the Mississippi, Des Moines, and Grand rivers and joined the Otoes and Missouris near Council Bluffs to the northwest of Cession 69.

Rev. John Todd reported the dispute as an attack by the Sac and Fox on the Iowa village on the Des Moines River near the site of Iowaville. He stated:

> Here the last great battle was fought between the Iowas and the Sacs and Foxes, in which the latter were the

assailants. The Iowas were taken altogether by surprise and unarmed. The attack resulted in the burning and complete destruction of the village and slaughter of great numbers of the Iowas, men, women and children. In this fight, which was more of a massacre than a battle, Black Hawk, then a young man, led a detachment of the aggressors. (Def. Ex. 19: *cf.* the account in the Iowa Journal of History and Politics of an "improbable" tradition of an 1821 battle in which the Sac and Fox led by Black Hawk defeated the Iowa, Def. Ex. 5, p. 258.)

On September 25, 1819, Indian agent Benjamin O'Fallon wrote to the Secretary of War from Council Bluffs that a misunderstanding had lately taken place between the "Sackees and the Ioways" which induced the latter to "abandon their original residence (on the Demoin and Mississippi) and locate themselves on this river; they are now living [259] with the Ottoes & Missouris who were all once one Nation." (Def. Exs. 22 and 114, p. 10; Iowa Ex. 61; Finding 11(c), 6 Ind. Cl. Comm. 464, 475-476; Tr. 194, 312, 313)

The plaintiffs' expert, Dr. Wallace, testified that during the period from 1819 to 1821 there was real trouble and some bloodshed between the Iowa and the Sac and Fox (Tr. 27, 140), and at that time some of the Iowa fled westward to the Otoe; the Grand River settlement was either emptied or rather small; and some Iowa apparently took refuge among the whites conceivably along the Chariton River, which would be in the territory claimed by the Sac and Fox plaintiffs, or the lower waters of the Grand. (Tr. 140) He discounted accounts of massacre and stated that the Iowa patched things up with the Sac and Fox and returned to the Des Moines River village by 1820. (Tr. 27)

Defendant's expert, Dr. Gussow, was of the opinion that only the Iowa who had been living along the Mississippi joined the Otoe (on the Platte River) following the dispute,

and that the Des Moines River village remained occupied until 1823. (Tr. 313, 314)

On October 1, 1820 George C. Sibley, the agent in charge of Fort Osage southwest of Cession 69, wrote, ostensibly from Fort Osage:

> The Ioways, only visit this place occasionally. This tribe is about as numerous as the Kansas. They are latterly much divided, so that I am unable to state precisely how many villages they occupy, or where they are located. About half the tribe I understand joined the Ottoes, near the Council Bluffs, last year, with the intention of remaining there. I am not sure whether they still remain there or not. The other part of the tribe remains in two villages, I believe, on the Des Moines and Grand Rivers. (Def. Exs. 76, p. 5 and 256; Tr. 320-321, Finding 11(c), 6 Ind. Cl. Comm. 464, 475) [260]

In his 1820 report of his expedition up the Mississippi as a government engineer, S. H. Long stated that Hard Heart, who had moved to the vicinity of Council Bluffs during the War of 1812, was joined there by his nation in the fall of 1819, "so that the Otoes, Missouries, and Ioways were then united." (Def. Exs. 26, p. 266 and 114, p. 12; Tr. 320; Finding 11(c), 6 Ind. Cl. Comm. 464, 475)

Long was informed that Hard Heart's followers would reinhabit their old village on the Des Moines River the ensuing season. (Def. Ex. 26, p. 270) It is probable that some of Hard Heart's followers and some of the other Iowa who joined the Otoe and Missouri on the Platte River in 1819 did return to the Des Moines and Grand River villages in 1820. (Tr. 27, 320, 323) On May 10, 1820, Indian agent O'Fallon wrote to the Secretary of War stating that the Iowa had returned to their old place of residence on the "Lamoin" (Des Moines) and Grand Rivers. (Def. Ex.

74, Tr. 323) However, some of the Iowa were reported still living with the Otoe as late as 1822. On May 12 of that year Thomas Forsyth, Indian agent at Fort Armstrong at Rock Island, Iowa, wrote to Governor Cass:

> The Ihowais have heretofore been as lost sheep, living in the interiours in two or three different villages, and the principal Chiefs with some few followers living with the Ottos whose language is similar to that of the Ihowais. I sent last fall a talk to the Ihowais advising the whole of that Nation to live together in one village up the River de Moine * * *. (Def. Ex. 100, Tr. 320)

It is not evident from O'Fallon's May 10, 1820 letter, *supra*, where the Grand River residence referred to therein was situated. It [261] is probable that it was near the mouth of the Grand River. In his 1820 report, Long states, without mentioning dates, that a band of Iowa which took up residence for about one year on the bank of the Missouri nearly opposite the Otoe village fourteen miles below Council Bluffs, joined the Iowa who had resided in a village on the lower part of the Missouri a considerable space of time, "when they abandoned their position, and returned to the waters of the Mississippi and erected a village on the Moyone, [Des Moines] where it still remains." (Def. Ex. 26, pp. 132-133; Iowa Ex. 139, pp. 52-53; Tr. 4-6)

The Iowa also resided in a town or village on the Chariton River, probably near its mouth, within Cession 69 from at least 1820-1822. In an October 11, 1821 letter to Richard Graham, the Indian agent at St. Louis, the Secretary of War declared:

> Genl. Green of Chariton, Missouri, has stated to this Department thro' Gov. Clark, that the Ioways residing on Chariton river have for the last fifteen months conducted themselves in a peaceable and friendly manner

> towards our Citizens, and in order to improve their present good disposition requests that a blacksmith may be employed by the public at Chariton, to repair their arms. (Iowa Ex. 72, Tr. 459-60)

An 1820 map of Missouri (Iowa Ex. 149) shows the town of Chariton within Cession 69 on the east bank of the East Chariton River at its confluence with the Missouri. On August 28, 1822 General Green wrote:

> The Ioway Indians residing on the Chariton River have heretofore been considered a lawless banditti desiring the war they infested the frontier and it is believed committed more outrages than any other tribe on the west of the Mississippi. Since the peace they have continued their depredations by stealing horses and frightening the frontier settlers in the Spring of [262] 1820 I had good cause to suspect them for stealing horses . . . I took the American who had lost the horses and with five others went to their town . . . I told them of their enemies and that by giving a few presents to the surrounding tribes and opening a way to their village I could have their women & children carried away captive, their houses burned down, the hill on which we stand to run red with their blood & their bones left to whiten on the bare ground . . . (Iowa Ex. 81, Tr. 462-463)

Since the Iowa village on the Chariton was in the portion of Cession 69 claimed by the Sac and Fox plaintiffs, and to which the Iowa plaintiffs make no claim, it not only does not support the claims of the Iowa plaintiffs, but is in derogation of the claims of the Sac and Fox plaintiffs to exclusive use and occupancy of that portion of Cession 69.

In 1823 the Iowa reportedly all left the Des Moines River village and built a new village somewhere on the Grand River or on one of the various forks of the Grand River. On July 7, 1823, Indian Agent Thomas Forsyth wrote to

the Secretary of War, from Fort Armstrong at Rock Island, Iowa, that the Iowa, formerly residing during the summer months on the Des Moines River, had all removed and built a *new* village "on the Grand River which falls into the Missouri River some distance above Chariton." (Def. Ex. 28, and 114, p. 13; Iowa Ex. 84; Tr. 202, 334, 464; Finding 11(d), 6 Ind. Cl. Comm. 464, 476) Of further indication that the Iowa had removed from the Des Moines area is Forsyth's letter of August 24, 1824 to Thomas McKenny of the Washington Office of Indian Affairs, stating:

> Since I have been in this country, I always have been agent for the Sauk and Fox Nation of Indians, and at one time the Ihowai Nation of Indians were included in my agency, but since their removal to the Grand River, [263] (which falls into the Missouri) they have had a Sub-Agent, since which I have had nothing to do with them. (Sac and Fox Ex. 97)

In his report on Indian usage and occupancy of Cession 69, the defendant's expert, Dr. Gussow, stated that in 1823 the main body of the Iowa joined the small group of Iowa which had settled near the mouth of the Grand River about 1816. (Def. Ex. 114, p. 22; Tr. 474 *et seq.;* Finding 104, *supra*) It appears likely, however, that a new village was established on the Grand River in 1823 and that at least two Iowa villages were in existence somewhere on that river in that year. On December 8, 1823, William Clark wrote to the Secretary of War Stating:

> I have authorized Genl. Green of Chariton, to cause the Ioway Indians to be supplied with such Blacksmith work as they may absolutely require—Vazquez as Interpreter—is at the Ioway *Towns* on Grand River . . . (emphasis added) (Sac and Fox Ex. 91—Iowa Ex. 86)

William Clark's Abstract of Licenses granted to trade with Indians lists a license issued on August 27, 1824 to Murry Campbell to trade with the "Ioways Fork of Grand

River." It also discloses a license issued on May 31, 1824 to William Williams to trade with the Osages & Kickapoos at "Fork of Grand River." (Iowa Ex. 92, Tr. 466-68) The abstract does not indicate the fork or forks of the river intended or whether the trading site was near the Iowa village or at a common point accessible to the Iowa, Osage and Kickapoo. The fact that the Iowa license and the Osage and Kickapoo license were issued to different traders may indicate separate trading sites at different forks of the Grand River. It is evident from the fact that there were [264] sufficient Osage and Kickapoo to warrant a trader for them in the western portion of Cession 69, that the Iowa usage of that area was not exclusive at that time.

On December 25, 1824, four months after the cession date, Superintendent of Indian Affairs, William Clark, wrote to the Secretary of War stating that the convenient trading place for carrying on trade with the "Ioways Tribe" had been designated as "at their principal village on Grand River or River Des Moines as it may be" (Iowa Ex. 93), thus indicating uncertainty between those two sites as the principal location of the tribe at that time or in the immediate future.

On August 2, 1827, Clark wrote from St. Louis to the Secretary of War, concerning an Iowa village about 40 miles within the State of Missouri. (Iowa Ex. 99) On the assumption that Clark was referring to the 1823 village on the Grand River, plaintiffs' expert, Dr. Wallace, located the 1823 village on the stream designated as the Thompson River approximately 27 miles, as the crow flies, south of the Missouri-Iowa border, as shown by the red dot on the map designated Iowa Ex. 183 (*cf.* Def. Ex. 116; Tr. 131-132, 159 *et seq.*, 179-180, 190-191, 207-208, 251, 469-470, 472-473).

According to Dr. Wallace, this village was abandoned in 1827 when the Iowa moved to the Little Platte River west of Cession 69 (Tr. 57; Finding 11(d), 6 Ind. Cl. Comm. 464, 476), and is the "old Ioway village" referred to by General Hughes in 1829, *supra*. (Iowa Ex. 108) [265]

In summation, it appears that there was no Iowa village in Cession 69 prior to 1812; that beginning with the War of 1812 until 1824, there were one, and at times two, Iowa villages in the additional lands claimed by the Iowa in the western portion of Cession 69; and that prior to the War of 1812 as well as from 1815 to 1823 the principal Iowa villages were north of Cession 69, with at least one village northwest of Cession 69 on the Missouri near Council Bluffs from about 1812 to 1822. From 1815 to 1816 the Iowa's exclusive use and occupancy of the Grand River area was broken by the presence of Sac and Fox villages on the Grand River. Conversely the Iowa village on the Charitan River from 1819 to 1822 lends no support to the Iowa claim to the land west of the watershed between the Grand and Chariton Rivers, although it does refute the Sac and Fox claim to exclusive use and occupancy of the portion of Cession 69 lying east of that watershed. The May 1824 licenses to trade with the Kickapoo and Osage is further evidence that Iowa use and occupancy of the additionally claimed lands was not exclusive as of that date.

Iowa Hunting, Mining, and Warfare

Evidence of Iowa hunting areas and of the extensiveness of their use thereof from 1803 to 1824 is at best sketchy and indefinite. In the years immediately preceding and following the Louisiana Purchase it appears that the Iowa were hunting predominantly to the north and west of Cession 69, and perhaps in the northern portion of Cession 69.

The plaintiffs' expert, Doctor Wallace, testified that the Iowa were regularly hunting in the area of the Platte Purchase in Cession [266] 151 to the west of Cession 69 in 1800. (Tr. 203-204)

The trader Anderson spent the winter of 1801-2 at the Iowa village 50 miles up the Des Moines River from whence he reported that the Iowa: "hunted near the Missouri, about ninety miles across country". (Def. Exs. 23 and 114, p. 20) It appears probable that this was in southern Iowa to the west of the Des Moines River village, along the headwaters of the Grand and Chariton rivers, in the direction of the place of the Iowa's recent sojourn on the Missouri near Council Bluffs and perhaps into the northern portion of Cession 69. (Tr. 305-306, 296, 491-7)

Pike wrote in his account of his 1805-07 trip up the Mississippi, that the Iowa:

> . . . hunt on the W. side of the Mississippi, the De Moyen, and westward to the Missouri. (Def. Exs. 18, p. 339 and 114, p. 21; Sac and Fox Ex. 136, Iowa Ex. 25)

Considering the location of the principal Iowa village on the Des Moines River at this time, the area described by Pike would seem essentially the same as that described by Anderson in 1801-02.

In 1811, Nicholas Boilvin, Indian agent at Prairie du Chien, Wisconsin, wrote to the Secretary of War that:

> The Sacs, Foxes, and Iowas can be as well supplied at the latter place as at the former, particularly as they have mostly abandoned the chase, except to furnish themselves with meat, and turned their attention to the manufacture of lead, which they procure from a mine about sixty miles below Prairie des Chiens. (Def. Exs. 5, p. 256; 20; and 114, p. 9; Sac and Fox Ex. 185, p. 256) [267]

The defendant's expert, Dr. Gussow, identified the "latter place" as Prairie du Chien, located on the Mississippi River in Wisconsin, more than 150 miles north of Cession 69, and "the former" as Fort Madison, located on the west bank of the Mississippi above the Des Moines Rapids. (Def. Exs. 113 and 114, p. 68; Tr. 310) James H. Lockwood, who traded at Prairie du Chien during the second decade of the nineteenth century, reported that the Iowas, who then had a village on the Upper Iowa, in northeast Iowa, were one of various tribes which visited Prairie du Chien. (Def. Exs. 99 and 114, p. 9)

There is evidence that by 1809 some Iowa as well as other northern tribes including the Winnebago, Sac, and Sioux, were hunting in Cession 69 as far south as its southern border, and that the Osage continued to hunt in the southern portion of Cession 69. There is also evidence of hostilities by Iowa and other tribes in the southern portion of Cession 69 and in the area south of Cession 69 about 1809 and 1810. Certainly the Iowa hunted in Cession 69 beginning with their occupancy of portions thereof during the War of 1812. Not until 1820, however, is there evidence that the Iowa were the only tribe frequenting the western portion of Cession 69. The aforementioned licenses for trade with the Kickapoo and Osage indicate that such exclusive usage was interrupted before the cession date.

On August 27, 1809 Governor Meriwether Lewis wrote to President Jefferson about the murder of several white inhabitants by neighboring Indians prior to Lewis' appointment in the territory. He was particularly concerned over lack of jurisdiction to try one case because the [268] murder had been committed by two Iowa and one Sac within their hunting ranges on Indian lands at the mouth of the Grand River, on the Missouri River. (Iowa Ex. 34, 1958 Tr. 28) The presence of a Sac hunting range on the Grand River

would of course be inconsistent with Iowa claims for exclusive use and occupancy of that area.

In 1810 a war party of nearly 300 warriors including Iowa, Pottawatomi, Sioux and Sac allegedly proceeded against the Osage and was observed in the vicinity of a French village two miles below the confluence of the Osage River and the Missouri. (Tr. 368, Def. Ex. 114, p. 62) The route of the war party was unknown, but it appears probable that it passed through Cession 69. In 1804, Lewis and Clark, on the seventh day up the Missouri after passing the Chariton Rivers, noted a crossing place for war parties of Sac, Iowa and Sioux against the Osage. (Iowa Ex. 20)

On July 1, 1808, Meriwether Lewis wrote to the Secretary of War, recommending Fire Prairie, a short distance south of the southwest corner of Cession 69, as the best site for building a trading establishment (Fort Osage) with the Osage nation. He added that Fire Prairie was also convenient to the "Kanzes" as well as to the principal hunting grounds of the "Ioways and Saucs". (Def. Exs. 101, pp. 1 and 2 and 114, p. 21; Comm. Opinion Dkt. 105, 11 Ind. Cl. Comm. 812, 857; Tr. 325-326) It was Lewis' aim to force these diverse tribes to trade at one location in a vain hope that they would thus find it absolutely necessary to live at peace with each other. He did not elaborate on the location of the Iowa hunting grounds alluded to. Conceivably they could have included [269] the Platte Purchase area, portions of Cession 69, or the area north of Cession 69.

It appears that Lewis was zealous of establishing this site and overstated the convenience of the location to the hunting grounds of at least some of the tribes. On July 16, 1812 the officers of Fort Osage wrote to the Secretary of War:

> If the objects of Government be to extend their parental views through this establishment to the nations of Indians that reside on the Missouri and its waters above viz: the *Kanses, Ottos, Missouris,* & different bands of *Pawnis.* We are decidedly of opinion that such have not, nor will not be effected by it. The nearest of these nations are three hundred miles from us, and the different Savage tribes are continually at war one with the other, which prevents them from going on trading expeditions far from their Villages, in the direction of their enemies. (Iowa Ex. 39)

The letter further states that the Osage had been prevailed upon to build their towns at Fire Prairie in 1808 but that a great number had become tired of the place and returned to their old towns to the south in the fall and winter of 1809-10 followed by the balance of the Big Osage and many lodges of the little Osage the following spring. Thus divided, the Osage were under continued attack by their enemies, the Iowa, Sac, Winnebagoes and other northern tribes.

The officers protested that the fort was of no advantage to the frontier, stating:

> . . . it is entirely useless, inasmuch as it is situated from 110 to 120 miles above the upper settlements on the Missouri, and that the country between it & sd settlements is frequented as much by Indians (the hunting ground of the Northern tribes) as any other part of Louisiana. Some of those nations at this time are well known to be hostile to us. . . . To conclude we will be permitted to state without [270] reserve that a wild speculative policy in the late Govr Lewis, placed the post here that, that, policy had not had the desired effect is obvious, and that Government will, continue it here after being convinced of its inutility, we do not believe. *(Id.)*

In its Order Admitting Additional Evidence on October 3, 1968, the Commission granted the motion of the Iowa

plaintiffs herein to take judicial notice of its decision in *Osage Nation* v. *United States*, Dkt. 105, 11 Ind. Cl. Comm. 733 (1962). Accordingly the Commission takes judicial notice of the following pertinent parts of the Osage decision. On November 10, 1808, the Osage ceded various lands to the United States including "all lands situated northwardly of the river Missouri" in Cession 69. (Finding 2, 11 Ind. Cl. Comm. 733, 734 (1962)) At the treaty council the Little Osage little chief, No Ears stated, with reference to the coming of the white Americans, ". . . My Father I am flattered to see you here, that we now have abandoned this land more so since you have come here, *I wish to continue to hunt from Charliton River to this place, and on all its dependences,* to traverse the Missouri to the mouth of the Kansas River . . ." (*Id.*, Finding 97 at 795, and Comm. Opinion at 812, 872) The Commission stated: "The reference by the Little Osage Chief, No Ears, to the hunting north of the Missouri River on the Chariton River places the Osage in that area at this time. However, there was joint occupancy there . . ." (*Id.*, 873) The draft of the 1808 Osage treaty of cession reserved Osage hunting rights in said lands in response to and in recognition of contemporary requests that the Osage hunting rights within the Grand River area (in Cession 69) be preserved (*Id.*, 867) In 1809 the Osage of the [271] Arkansas and Missouri river drainages continued to hunt and gather within portions of the area ceded, including "the areas north of and along the southern fringe of the Missouri River despite the Sacs and Ioways there, which were areas of joint use and occupancy." (*Id.* Findings 109, 110 p. 806) The Commission also stated of the Osage: "They were continually at reciprocal warfare in this area and north of the Missouri River and in the area running along the south of that river with the northern tribes. As a result most of those who encamped there prior

to the signing of the treaty moved back by 1811 . . . It was one thing for their warriors and hunters to successfully use the areas north and south of the Missouri and another to maintain safe villages." (*Id.*, 880) In referring to the reasons given by the officers of Fort Osage in their letter of July 16, 1812, for abandoning the post, the Commission stated: "These reasons, made by men who were there and had first hand knowledge, place the Osages in continuous use of this land as provided by the treaty and indicate continued joint occupancy north of and along the southern fringe of the Missouri River." (*Id.*, 881, 882)

We are reminded of the following words of the Court of Claims in *Indians of Fort Berthold* v. *United States*, 71 Ct. Cl. 308, 335 (1930) where the Sioux, like the Iowa, Sac and Fox, Sioux and others in this case, played the role of conqueror:

> The neighboring Sioux were the plaintiffs' inveterate enemies. This hostile tribe forced the plaintiff Indians to relocate their villages more than once along the [272] Missouri River, and unquestionably the continuing menace of Sioux hostilities precluded at times extensive hunting excursions into the claimed territory; but assuredly armed intervention, forcible ejection from lands, and fear of death and tribal destruction do not indicate abandonment.

Where a plaintiff has wrested a claimed territory from other tribes, the plaintiff's use and occupancy of the area could only begin to develop into Indian title when such use and occupancy became exclusive and the prior rights held by the conquered tribes ceased to exist. (*Confederated Tribes of the Umatilla Indian Reservation* v. *United States*, Dkt. 264, 14 Ind. Cl. Comm. 14, 119 (1964))

Evidence in contemporary writing that Indians "deserted their ancient habitat" because of raids by a hostile tribe,

and that the lands had been left empty for at least two decades, has been held to indicate abandonment. The *Caddo Tribe of Oklahoma* v. *United States,* Dkt. 226, 8 Ind. Cl. Comm. 354, 374-376 (1960) In the present case the record as a whole does not evidence that the Osage had abandoned Cession 69 for such a period of time prior to August 4, 1824.

Fort Osage was abandoned in 1813, reoccupied from 1815 to 1819 and then used as a trading post until 1822, when the Osage occupation of the Missouri River ended. (Sac and Fox Ex. 188, p. 95)

When George C. Sibley, the Agent in charge of Fort Osage, wrote to Thomas L. McKenny on October 1, 1820 that the Iowa only visited that place occasionally he added: [273]

> The Ioways hunt principally between the Missouri, north of it, and Missippi rivers, from the heads of the two Chacatons, up to the Nodoway, and sometimes still farther up. (Def. Exs. 76 and 5, p. 256; Tr. 320-323; Finding 11(c), 6 Ind. Cl. Comm. 464, 475; Comm. Opinion, Dkt. 105, 11 Ind. Cl. Comm. 812, 889-890)

Sibley stated in the same letter that the Iowa were then much divided, with probable villages at Council Bluffs, and on the Des Moines and Grand Rivers. The defendant's expert, Dr. Gussow, interpreted the reference to the heads of the two Chacatons as being to the heads of the Chariton Rivers. (Tr. 321) From Sibley's ill-defined description it would appear that the Iowa hunted principally north and west of Cession 69 at that time and perhaps, to an indeterminable extent, within Cession 69.

On January 2, 1820 General Atkinson wrote to the Secretary of War from Council Bluffs, stating that the wagon route which he had marked out from Council Bluffs to Chariton, at the mouth of the Grand river, passed through a country "frequented by no other Indians but the Iowa's,

a small band of not more than one hundred & fifty warriors." (Iowa Ex. 65, 68; Def. Exs. 27 and 114, p. 12; Tr. 449-455)

As noted previously, the government engineer, Long, wrote in his 1820 report of his travels up the Mississippi, that the Iowa had resided in a village on the lower part of the Missouri for a considerable space of time before being joined by the band from the Council Bluffs village. (Def. Ex. 26, p. 132) Dr. Gussow assumed that the Council Bluffs band joined the lower Missouri village about 1820 and that the latter village was "probably in the vicinity of the Grand-Chariton River hunting grounds" (Def. Ex. 139, pp. 52-53, Tr. 446) [274]

The plaintiffs' expert, Dr. Wallace, testified, without citing supporting documents, that Clark stated, inferentially about 1820, that the Iowa hunted down the Missouri as far as the Grand River (Tr. 66) He also testified, again without citing supporting documentation, that the Iowa hunting pattern about 1824 involved winter and summer hunts, that the Iowa would leave their summer settlements in the fall, moving to winter hunting grounds which might be anywhere up to two or three hundred miles away from the summer village, and that they would return to the summer settlement in the spring to plant corn and other vegetables. Dr. Wallace stated:

> After the planting, many of the men and also, no doubt, some of the females, left for a summer hunt which if buffalo were available would particular involve buffalo hunting, although by this date buffalo were getting scarce. 1824 buffalo were very scarce in Missouri and Southern Iowa. Then they would return to harvest the crops and, as I said, then start off on the winter hunt again. (Tr. 33-34)

Dr. Wallace further opined:

> The Iowa at this time, in 1824, seemed to have concentrated their hunting activities in the region between

> the Missouri River and the Chariton River south of the Des Moines, roughly in a rectangle, bounded by the Nottoway, the Grand-Chariton watershed, and the Missouri River, which makes it then near Kansas City.
>
> I would say the northern boundary for the Iowa hunting activities would be the Des Moines River. (Tr. 36)

In respect to the Sac, Fox, and Iowa use of this territory for hunting in 1824, Dr. Wallace testified:

> Well, it is pretty apparent that their use of the region was limited by the presence of a great many white people[6] in the area, so that the parts of 69-120 which [275] would be usable for hunting purposes would be the upper waters of the various streams that run through it—in other words, the upper waters of the Grand, the upper waters of the Chariton and the Salt and Two Rivers—and not the region right down along the Mississippi or probably immediately along the banks of the Missouri. (Tr. 94-95)

As early as 1820 there were over 20,000 white people living in the Boone's Lick area alone. Although Boone's Lick was in the portion of Cession 69 claimed by the Sac and Fox, the presence of such numbers of whites in the vicinity undoubtedly depleted the game animals and reduced Iowa hunting in the lower portion of Cession 69 appreciably (Comm. Opn., 12 Ind. Cl. Comm. 478, 531 (1963))

Dr. Gussow testified as follows concerning Iowa hunting practices prior to 1824:

> I feel that the main Iowa hunting was westward toward the Missouri. I should feel it was very likely they did do some hunting, particularly from the Des Moines River village, they moved in a southwesterly direction, going down to the other way, the Little Platte

[6] See note 2, *supra*.

> Rivers, and they passed through and hunted some parts of the northwestern parts of Cession 69, yes.
>
> I think when they were coming from the Des Moines River village they were making journies westward toward the Missouri and Nishnebottna and then the headwaters of the Nottoway and the headwaters of the Little Platte and the headwaters of the Grand River, and some parties sometimes went in a southwesterly direction toward the Nodoway and Little Platte and came through the western parts of Cession 69, I believe. (Tr. 477-478) [276]

He added that the Iowa may have hunted into Cession 69 as low as the fork of the East and West branches of the Grand River but that he didn't think they came much further below it. (Tr. 478) This fork, as shown on the map, Def. Ex. 115, appears to be within the portion of Cession 69 credited to the Iowa by the Commission in Finding 15, *supra.*

Summation of Iowa Use and Occupancy

Having reviewed the evidence of Iowa use and occupancy from 1803 through 1824, the Commission is of the opinion that the Iowa plaintiffs have not shown that they had Indian title to the additional lands which they claim in this portion of these proceedings inasmuch as they have not demonstrated by a preponderance of the evidence that they had actual, exclusive and continuous use and occupancy of said lands for a long period of time prior to August 4, 1824. Whereas they had one or two villages at a time at several locations within the additionally claimed territory beginning with the War of 1812 through 1824, they had no villages in the area prior to the War of 1812, and from 1815 through 1823 the principal Iowa villages were outside of the claimed territory. Whereas some members of the tribe hunted and participated in war parties intermittently in the claimed territory prior to the War of 1812, their use thereof was by

no means exclusive but rather was challenged with reciprocal warfare and hunting by the Osage throughout that period. The Winnebago, Sioux, and Sac, and probably the Pottawatomi also made use of the claimed territory for raiding and hunting between 1803 and 1812, [277] and the Sac and Fox each had a village on the grand River in 1816.

It is clear that common usage of an area wherein a number of tribes had hunting rights does not establish Indian title. Thus in *The Otoe and Missouria Tribe of Indians,* Docket 11, 2 Ind. Cl. Comm. 355, 356-357 (1963), the Commission found that as to an undefined area east of the Missouri River, the plaintiffs only had hunting rights to be exercised jointly as users in common with other tribes and that the value of those hunting rights was growing less as the buffalo and other game disappeared. Even granting ownership of such rights, the Commission was unable to determine their value, or that the compensation received therefor was not adequate, or was unconscionable, or that the plaintiff had been unfairly treated.

The plaintiffs infer that to the extent that the Sac and Fox hunted on lands within Cession 69 presently claimed by the Iowa, and *vice versa,* such hunting was "permissive" and hence not in derogation of the plaintiffs' respective claims. (1969 Tr. 21) Presumably they would have the Commission reach the same conclusion as tc overlapping village sites.

It is true that a tribe's exclusive use and occupancy of a territory is not affected by its permitting other tribes, including guests and kinsmen of the host tribe, to use the area, as distinguished from using it in common with such other tribes. *The Lummi Tribe of Indians* v. [278] *United States,* Dkt. 110, 5 Ind. Cl. Comm. 525, 552 (1957), The *S'Klallam Tribe of Indians* v. *United States,* Dkt. 341, 5 Ind.

Cl. Comm. 697, 704 (1957). Nor will use by other Indians defeat title where such use was made with acknowledgment that the land was the exclusive home of the plaintiffs, *The Snake or Piute Indians of the Former Malheur Reservation in Oregon* v. *United States,* Dkt. 17, 4 Ind. Cl. Comm. 564, 624 (1956).

However, there is no evidence that either of the plaintiff tribes exclusively used or occupied any portion of the additionally claimed areas for a long period of time or thereafter permitted use or occupancy to the other. Nor is there evidence that the Iowa plaintiffs granted such permission to the other tribes which used the claimed territory. Rather it appears that the plaintiff tribes and the other tribes using Cession 69, used it in common. It is well settled that common usage of an area cannot ripen into original Indian title by one of the users with the others considered as permissive users. The permissive use doctrine cannot apply until one of the users has obtained exclusive use and occupancy for "a long time". *The Confederated Tribes of the Umatilla Reservation* v. *United States,* Dkt. 264, 14 Ind. Cl. Comm. 14, 119 (1967).

In the *Umatilla* case, *supra,* 119, plaintiffs' expert witness attempted to explain away all evidence of other tribes fishing, hunting, or gathering in the area which he assigned to one tribe, by saying they did so on a guest-host or permissive-use basis, regardless of the purposes for which they entered or used the area and the fact [279] that they had participated in the conquest of much of the same territory. In this manner he would have avoided the adverse effect of evidence of exploitation and use by more than one tribe, which usually indicates a common use area and thus prevents original title coming into existence. Here, as in the *Umatilla* case, each plaintiff tribe must prove that it held original title to a part of the claimed area, in this case by

August 4, 1824. As in *Umatilla,* common or joint usage of any part of the claimed land prior to the ripening of original title, shown under plaintiffs' theory of permissive use, destroys the essential element of exclusiveness and prevents the development of title. Only after they possessed original title could they exercise the right of exclusive use and occupancy and grant permission to guests to enter. The Commission stated that it was not enough to have a mutual recognition between the plaintiffs or between the plaintiffs and their neighbors as to their areas of original title, since such title cannot be conferred by agreement or recognition but must rest upon a sufficient period of exclusive use. (*Umatilla, supra,* 119, citing *The Spokane Tribe of Indians* v. *United States,* 163 Ct. Cl. 58 (1963))

Only in the case of closely integrated tribes or bands has the Commission held that joint tribal entitles could hold *Indian title* to the same territory at the same time (on an exclusive but undivided basis). *E.g., Minnesota Chippewa Tribe, White Earth Band, Leech Lake* [280] *Band, Mille Lac Band* v. *United States,* Dkt. 18-B, 8 Ind. Cl. Comm. 781, 827, 829 (1960). In all other instances joint use and occupancy by friendly tribes on an equal, "exclusive" (as to all others), and undivided interest basis, has been found by the Commission only where recognized title was involved. E.g., *United States* v. *The Kickapoo Tribe of Kansas, The Peoria Tribe of Indians of Oklahoma on Behalf of the Wea Nation,* 174 Ct. Cl. 550, 555 (1966) and Treaty of Grouseland, 7 Stat. 91-92, Art. IV. (1805) discussed at 174 Ct. Cl. 553; and *The Otoe and Missouria Tribe of Indians* v. *United States* and *The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, The Iowa Tribe of the Iowa Reservation in Oklahoma, et al., Omaha Tribe of Nebraska, et al., The Sac and Fox Tribe of Indians of Oklahoma, The Sac and Fox Tribe of Missouri, Sac and Fox Tribe of the Mississippi in Iowa,*

et al., v. *United States, supra,* Dkts. 11-A and 138, 5 Ind. Cl. Comm. 351, 364-365 (1957).[7] Although the Sac and Fox are also treated as a single tribal entity, there is no showing that the Iowa were so closely allied with the Sac and Fox to warrant similar treatment.

If the Court of Claims opinion (179 Ct. Cl. 8, 23) is to be construed as meaning that the twenty-one year period of time between 1803 and 1824 could constitute "a long time" requisite for establishment of Indian title, we nevertheless do not find evidence of continuous [281] and exclusive use and occupancy of any portion of the additionally claimed land by the Iowa plaintiff for more than a small fraction of that period.

Iowa use and occupancy of the area was undoubtedly expanded during the War of 1812, although the principal Iowa villages from 1815 to 1819 were again located north of Cession 69. Although there is evidence that the Iowa frequented portions of the claimed lands on an exclusive basis in 1820, the United States issuance of licenses to trade with the Osage and Kickapoo at the "Fork of Grand River" on May 31, 1824, indicates that any such exclusive use was short lived and terminated prior to the date of cession.

The fact that the land claimed by the Iowa plaintiffs was included within the description of the land ceded to the United States by the Iowa plaintiffs on August 24, 1824 is not by itself sufficient proof that the Iowa had Indian title to the land. (*Red Lake, Pembina, and White Earth Bands* v. *United States,* 164 Ct. Cl. 389 (1964), cited in *The Confederated Tribes of The Warm Springs Reservation of Oregon* v. *United States,* 177 Ct. Cl. 184, 194 (1967) on appeal No.

[7] *Cf. The Sac and Fox Tribe of Indians of Oklahoma,* 161 Ct. Cl. 189, 202 (1963), note 11, stating that Indian title use and occupancy must be exclusive "Except where two or more tribes or groups inhabit a defined area in joint and amicable possession."

2-64 of Ind. Cl. Comm. Dkt. 198, 8 Ind. Cl. Comm. 577 (1960), 12 Ind. Cl. Comm. 664 (1963)) The fact that the Iowa, the Sac and Fox, and the Osage each separately ceded all of Cession 69 is further evidence of the competing claims and evidence against exclusive title in any of said tribes. (*Red Lake, Pembina and White Earth Bands, and Minnesota Chippewa* [282] *Tribe* v. *United States,* Dkt. 18-A, 1 Ind. Cl. Comm. 548, 595-596 (1951))[8]

In short, the Iowa use and occupancy of the additionally claimed lands was not actual, exclusive, continuous or for a "long period of time" prior to August 4, 1824.

Sac and Fox Use and Occupancy: 1803-1824

The Opinion of the United States Court of Claims contains the following statements concerning the Sac and Fox:

> They maintained for many years and on into the 1800's several separate but permanent villages constructed along and on both sides of the Mississippi River, from as far up as the Prairie du Chien and Turkey River area, to as far down as the mouth of the Missouri River . . . (179 Ct. Cl. 8, 16)

> During the War of 1812 with Great Britain, those members of the Sac and Fox Nation, who claimed allegiance to the cause of the United States departed their Mississippi River villages, and began to move down into Cession 69. There, during the years that followed, they were located at various places, and at times in the company of the Iowas. Reports have placed them on the Salt, Missouri, Osage, Grand and Chariton Rivers. . . . The principal hunting grounds of the Sac Indians west of the Mississippi River stretched southward below the Des Moines River to the Missouri River, and includes generally the northeastern part of Cession 69

[8] *Cf. Creek Nation* v. *United States,* Dkt. 21, 2 Ind. Cl. Comm. 98, 200-201 (1952) wherein conflicting cessions in the nature of a quit-claim by other tribes were discounted as disproving plaintiff's title.

and all of Cession 50. . . . The evidence contains many references to the Sac and Fox hunting in this vicinity which show consistent use from about 1780 to at least 1810. (*Id.*, 16-17) [283]

During the period from 1795 to 1824, the Sac and Fox hunted extensively the area in the eastern and southern parts of Cession 69 from the Mississippi on the east to the Grand and Chariton Rivers on the west and from headwaters of such last-mentioned rivers on the north to the Missouri River on the south, and even beyond this area on the west and south. They were friendly with the Iowa and frequently hunted in the same area with them. The early explorers, traders, and military people supplied much of this evidence and information. For instance, in his 1806 Report to the Congress, Captain Lewis said that the Sac and Fox Nation sometimes hunted toward the Missouri and Lieutenant Pike in 1810, based on his explorations made in 1805, stated that the Sacs hunted on the Mississippi River and its tributaries from the Illinois River north to the River Iowa "and on the plains west of them which border the Missouri."

Captain Lewis in 1808 described the Fire Prairie, which is located near the southwest corner of Cession 69 as convenient to "the principal hunting grounds of the Ioways and Saucs." (*Id.*, 17)

The Missouri Gazette informed its readers in 1813 that more than 1500 Sac and Fox Indians had gone to their "wintering grounds, • • • besides those contained in 155 canoes which ascended the Missouri on Monday last, near 500 warriors crossed over by land."

Two years later, General Clark reported that members of the Sac and Fox Nation resided west to northwest of St. Louis on both sides of the Missouri River. In 1819, Major Long who had recently explored the Missouri River, stated that the Sac and Fox and Iowa Nations hunted on the plains towards the sources of the Grand River. Indian Agent Sibley in 1820, reported that the Sac and Fox and Iowa Indians regularly made

a fall hunt on the Missouri River. Sac and Fox Agent Forsyth mentions the presence of Sac and Fox along and near the Missouri River and in the vicinity of the Grand River in the years 1817 to 1820. In an extensive report concerning the Sac and Fox Nation which Agent Forsyth originally wrote in 1822, and later revised in 1827, he says that the members of the Sac and Fox Nation would hunt "on the waters of the Missouri River and its tributaries" and sometimes further west.

From about 1812 to 1825, the Sac and Fox Nation had a village on the north side of the Missouri River between the Chariton and Grand Rivers and therefore on the west [284] boundary of the lands claimed in this appeal. An early settler reported that the Sac and Fox had a village in 1818 east of the Chariton River in present Randolph County, Missouri, near the present town of Yates. In 1819, there was a Sac camp on the Missouri River below Fort Osage and also near the mouth of the Grand River. For a time (1815-1818) there was also a Sac village south of the Missouri River near Jefferson City, Missouri. (*Id.*, 18)

We have carefully examined the entire record as well as the Brief of the Sac and Fox appellants in the Court of Claims in relation to the above statements. The record as a whole establishes that many of the areas cited in the above statements as being used or occupied by the Sac and Fox were not within the additional area claimed by the Sac and Fox plaintiffs and that the Sac and Fox use and occupancy of the additional claimed area, far from being continuous and exclusive for "a long time" prior to August 4, 1824, was sporadic and challenged or shared by other tribes and white settlers throughout much of the period from 1803 to 1824.

Sac and Fox Villages

There is no evidence of a Sac or Fox village in Cession 69 prior to 1815 nor, with the possible exception of the Sac

and Fox village on the Osage River south of Cession 69 during the War of 1812, is there any evidence of a Sac and Fox village "as far down as the mouth of the Missouri River." From 1800 until the War of 1812, the Sac and Fox villages were located principally along the Mississippi River and its principal tributaries in Iowa and Illinois from the mouth of the Des Moines River northward to Prairie du Chien, Wisconsin. During that period the major Sac and Fox villages were located near the site of [285] Fort Armstrong at the confluence of the Rock River and the Mississippi (*cf.* Tr. 95-96, 395).

In 1805, Major Zebulon Pike reported that the Sac, the first nation of Indians he met in ascending the Mississippi from St. Louis, principally resided in four villages, the first of which consisted of 13 log lodges at the head of the rapids of "De Moyen" on the west shore of the Mississippi. (Def. Exs. 18, pp. 5, 337 and 114, pp. 29, 31, 32; Tr. 356, 359, 362) This would be in Cession 120, about 10 miles above the mouth of the Des Moines River.

Pike gave the location of the second Sac village in 1805 as 60 miles above the head of the Des Moines rapids on a prairie on the east shore of the Mississippi, *i.e.*, in Illinois. (Def. Ex. 18, p. 337) The defendant's expert witness, Dr. Gussow, credited Pike with stating that this village was about two and a half miles out on the prairie, which was called "half way to Prairie du Chien." (Tr. 356) Dr. Gussow also located this village on the Henderson River in Illinois about six miles above the site of Burlington, Iowa. (Def. Ex. 114, pp. 29, 31) His authority for this however appears to be Thomas Forsyth's August 28, 1824 account of a Sac village on the east side of the Mississippi on the Henderson River about 75 miles south of Rock Island, Illinois. (Def. Exs. 114, p. 31 and 47, p. 3) Although these accounts may refer to the same village, they may as well refer to two

separate villages, or may reflect a movement from the former to the latter location. [286]

Pike also reported a Sac village in 1805 on the Iowa River in Iowa, far to the north of Cession 69. (Def. Exs. 18, p. 337 and 114, pp. 28, 31, 32) The location of this village is purportedly shown on King's 1806 map, Def. Ex. 45. (Def. Ex. 114, p. 28)

Pike located a fourth Sac village in 1805 still farther north, on the Rock River about three miles from its mouth. (Def. Exs. 18, p. 337 and 114, pp. 29, 31) Dr. Gussow credited Lewis and Clark with describing in 1804, two Sac villages and one Fox village a few miles above the mouth of Rock River on the west bank of the Mississippi, and stated that Rock River was the principal location of the Sac from 1805 to 1830. (Def. Ex. 114, p. 28, Tr. 328) In 1812, Ninian W. Edwards reported that there was a Fox village three miles below Rock River and a very extensive Sac village of nearly 200 lodges one and a half miles up Rock River on the south side. (Def. Ex. 103) Another traveler to Fort Armstrong, described as being located on the west shore of the Mississippi at the mouth of Rock River, stated that the east bank of the mouth of Rock River was lined with an encampment of Fox and that the Sac were three miles to the east on the north bank of Rock River where they had their most extensive encampment, the only one they constantly inhabited in the summer months. (Def. Exs. 54 and 114, p. 33) Ostensibly this description was made subsequent to the establishment of Fort Armstrong and prior to the cession date of August 24, 1824, although the exact date and the identity of the traveler are not disclosed by the exhibits.

In 1805 Pike reported that the Fox resided in three villages, the [287] first of which was on the west side of the

Mississippi, six miles above the rapids of Rock River. (Def. Exs. 18, p. 339 and 114, p. 29)

Pike reported a second Fox village in 1805 about 12 miles in the rear of the lead mines, most likely near the site of Dubuque, Iowa. (Def. Exs. 18, p. 339 and 114, p. 29; Tr. 357) In 1812 Ninian Edwards recorded locations of seven Fox villages along the Mississippi in the lead mining area from above Turkey River in northeast Iowa, to Rock Island at the mouth of the Rock River, including a village of fifteen lodges on Turkey River. (Def. Exs. 103 and 114, p. 33) In 1810-11 the lead mines, especially those at Dubuque, were reported to be of great value to the Sac and Fox who of necessity had begun mining as the game in their territory was nearly exhausted. (Def. Exs. 20; 71, p. 255; and 114, p. 66; Tr. 369, 370)

Pike gave the location of the third Fox village in 1805 as on the Turkey River, a half league from its mouth. (Def. Exs. 18, p. 339 and 114, p. 29)

During the War of 1812 the Sac and Fox were invited by the United States to move to temporary settlements on the Grand, Osage, and Lamine Rivers. The Grand River, which has its origin in Iowa, flows through the western portion of Cession 69 which is claimed by the Iowa plaintiffs and to which the Sac and Fox plaintiffs make no claim. The Osage and Lamine Rivers lie south of Cession 69. Not all of the Sac and Fox were friendly to the United States. Some began hostilities against the Boone's Lick settlement along the Missouri River in the southeastern portion of Cession 69 before Congress passed the Act of [288] June 18, 1812, declaring a state of war to exist between the United States and England. Black Hawk and 200 of his warriors declined the invitation to move south, and instead joined the British forces near Lake Erie. (Def. Ex. 55, p. 214; Tr. 373) In 1815 Black Hawk engaged the whites in the battle of "Sink

Hole" in Lincoln County, Missouri, which is in Cession 50. (*Id.*, and Def. Ex. 114, p. 63)

It is not clear from the record exactly when others of the Sac and Fox began to move southward during the War of 1812, nor to what extent they moved into Cession 69. Many of the Sac and Fox did not begin the southward move until 1813 or later. Some apparently only moved south to the Des Moines River, north of Cession 69. Others apparently moved into or through Cession 120 and the northeast portion of Cession 69 (credited to the Sac and Fox by Finding 23 herein, 6 Ind. Cl. Comm. 464, 493) and south thereof into Cession 50 and still further south to the Osage River. Some settled on the Grand River (which flowed through the portion of Cession 69 claimed by the Iowa) and possibly along the Missouri River in Cession 69: these, together with those who settled on the Osage, reportedly became known as the Sac and Fox of the Missouri. (Tr. 31-32) Most of the Sac and Fox returned to their former village areas north of Cession 69 following the War of 1812. (Tr. 139)

On March 10, 1812 John Campbell (ostensibly Lt. Campbell in command of Fort Mason at the confluence of the Salt and Mississippi Rivers in Cession 50: *cf.* Sac and Fox Ex. 42) wrote to William Clark [289] from Quiver Station (location undisclosed but probably on the Cuivre River in Cession 50) concerning an interview with some Sac Indians who claimed protection from him. Their chief had informed him that there were a number of Sacs on the Mississippi above the Salt River, which would place them most probably in Cession 50. (Def. Ex. 64, Tr. 370-71) Dr. Gussow interpreted this as meaning that these Sac were staying around Fort Mason for protection from British sympathizers. (Tr. 370-71, Def. Ex. 114, p. 64)

On April 13, 1813 Maurice Blondeau wrote to Governor Howard concerning Blondeau's visits and conferences with

the Sac and Fox over their proposed southern movement to avoid being embroiled in the War of 1812. On February 28, 1813 Blondeau had arrived at the Iowa River where he found fifty lodges of Sacs. On March 1, he was conducted to a Fox camp, ostensibly in the same vicinity. The Sac and Fox had been invited by the Kickapoo and Potawatomies on the Illinois River to join the British at Chicago. They responded by saying that they would not go to war with any nation, but would instead descend below Fort Madison (located on the west bank of the Mississippi above the Des Moines Rapids) and try to live in peace on a small piece of ground. At the same time the Sacs visited Fort Mason in Cession 50 to tell Lt. Campbell that they were going to the Des Moines River to stay and that they would send their canoes for the remainder of their people on the Iowa. On March 27, 1813 Blondeau held a council with Sac and Fox chiefs at Fort Madison. The Sac chief stated that the Sacs were waiting for the Fox, who were far to the north at Prairie du Chien, [290] Wisconsin, to join them to go down below Fort Madison. The Fox chief stated:

> • • • we beg'd the sacks to wait for us, as part of our nation were at Prarie [sic] du Chien we will decend the river together and leave none of our nation behind • • • (Def. Ex. 102)

Some of the friendly Sacs, in order to avoid trouble during the war, moved to the Missouri River, where on September 13, 1815, at Portage des Sioux, St. Charles County, in Cession 50, they and the friendly Fox entered into treaties with the United States. (Def. Ex. 55, p. 214)

The Sac village on the Osage River was apparently established between 1814 and 1817. Dr. Gussow testified that Jules De Mun recorded in his journal in 1817 that the Sac village on the Osage River had been established "in the last three years, by permission of the government . . ."

(Tr. 373) Without citing additional evidence Dr. Gussow also testified that this village existed from 1812 to 1815. (Tr. 339, 341, 372)

There is no evidence of a Sac or Fox village on the Chariton River at any time.[9] The plaintiffs have indicated that their [291] statement which was adopted verbatim by the United States Court of Claims (179 Ct. Cl. 8, 18), to-wit, "From about 1812 to 1825 the Sac and Fox Nation had a village on the north side of the Missouri River between the Chariton and Grand Rivers and therefore on the west boundary of the lands claimed on this appeal," was based upon Iowa Ex. 44, Sac and Fox Exs. 56, 59 and 137, and Tr. 31-32, 57-61 (Brief of Sac and Fox Appellants in the United States Court of Claims, 52 (1966)). The following examination of this evidence shows it to be non-supportive of plaintiffs' statement.

Iowa Exhibit 44 is the *Missouri Gazette* article of February 19, *1814* stating that the "Sacks, Foxes and Ioways are with the United States Factory Agents on Grand River and on the south side of the Missouri." As we mentioned in our discussion of this exhibit in connection with Iowa villages, *supra,* the defendant's expert witness, Dr. Gussow, testified, persuasively, that this merely meant that the designated tribes were at the trading post (in the portion of Cession 69 claimed by the Iowa).

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[9] Commission Finding 20, 6 Ind. Cl. Comm. 464, 487, accordingly will be changed to read: "During the War of 1812, portions of the Sac and Fox Nation who claimed allegiance to the United States moved down from their Mississippi River site; and were found at various locations on the Salt River in Cession 50, on the Missouri River in Cession 50, and possibly in Cession 69, on the Grand River in the western portion of Cession 69 claimed herein only by the Iowa plaintiffs, and on the Osage River to the south of Cession 69." The first full sentence of p. 508 of our 1958 opinion (6 Ind. Cl. Comm. 446, 508), will also be changed to read: "Reports have placed them on the Salt, Missouri, Grand, and Osage Rivers." See order of this date.

Sac and Fox Exhibit 56 is William Clark's September 20, 1815 list of Indian Tribes showing 800 Sacs and Foxes of Missouri, friendly, residing *or roving* "W. to northwest" of St. Louis on both sides of the Missouri River. Plaintiffs and the Court of Claims (179 Ct. Cl. 8, 18) used the same exhibit as the basis of the statement, *supra,* that "Two years later [1815], General Clark reported that members of the Sac and Fox nation *resided* west to northwest of St. Louis on both sides of the Missouri River" (Emphasis added). The same list shows [292] in the indentically described direction and location seven bands of Sioux, totaling 8000 souls, as well as 1600 Kanzas, southwest by west on the Missouri and Kanzas rivers; 1000 Ioways, west on the Missouri and Grand rivers; 1200 Ottoes, west, on Missouri and river Platte; 6000 Pawnees, west on Missouri and river Platte; 2000 Mahas, on Missouri; 400 Poncas, west, on Missouri; 2000 Chehaws, northwest by west, on Missouri; 3000 Arickaras, northwest, on Missouri; and 3200 Sacs, north, two miles up Rocky River, Illinois Territory; and 1200 Foxes, north, on Mississippi, "below Prairie du Chien, M.T." While we do not mean to imply that all of the tribes listed by Clark as on the Missouri were in Cession 69, it is obvious at least that the exhibit does not support the dates or location of the alleged Sac and Fox village. It is problematical whether the Sac and Foxes on the Missouri were "roving" or "residing" and whether within Cession 69 or 50 although it appears likely that some at least were residing within the southeast edge of Cession 69 at that time within the portion claimed by the Sac and Fox plaintiffs. A similar list of tribes issued by the Secretary of War on November 4, 1816 included 3000 "Socks" in "1 Village at rock river, 1 Village at Grand river, & Scattered on the W. side of Mississippi"; and 1500 "Foxes" in "1 Small Village at rock river, 1 ditto at grand river, 1 large village at turkey river W. side (unreadable)" (Iowa Ex. 52). It would

thus [293] appear that in 1816 at least some Sac and Fox were residing in a joint village or in separate villages on the Grand River, probably within Cession 69. As heretofore noted however, the portion of the Grand River which lies within Cession 69 is in the western portion thereof claimed by the Iowa plaintiffs and to which the Sac and Fox plaintiffs make no claim.

Sac and Fox Ex. 59 is a historical account of a report by an early settler of an old Indian village occupied in 1818, about a mile northwest of the village of Yates (ostensibly in Randolph County in the eastern portion of Cession 69). While there is no evidence that the settler indicated which tribe or tribes inhabited the village, the report infers and it may reasonably be assumed, that it was a Sac and Fox village. Randolph County however lies east of the main Chariton River so that this account does not support the claim of a village between the Chariton and Grand Rivers. In fact the plaintiffs and the Court of Claims (179 Ct. Cl. 8, 18) in their very next sentence cited the same old settler reference as evidence of a village east of the Chariton River. The plaintiffs and the Court of Claims thus appear to have been confused and inadvertently to have created the impression of two villages where actually only one existed. [294]

Sac and Fox Exhibit 137 is an 1820 report by Major Marston showing, *inter alia,* the results of an interrogatory of Sac and Fox chiefs at Fort Armstrong. Marston stated that the chiefs were suspicious and unwilling to answer the questions "and that many of their answers were evasive and foeign [sic] to the questions." In response to a query of whether any portion of the tribes were scattered in other parts, the chiefs replied that some of their people were "on the Missouri, some near Fort Edwards and some among the Pottawattanies." Inasmuch as the bulk of the Missouri

River does not even border Cession 69, and inasmuch as Fort Edwards was on the east bank of the Mississippi River near the foot of the Des Moines Rapids, east of Cessions 69 and 120, and inasmuch as the Pottawatomie were not then known to be in Cession 69, we do not find in this statement, evidence that the Sac and Fox were in Cession 69, much less that they were in a village on the Chariton River, and *a fortiori* not from 1812 to 1825.

The transcript references cited by the plaintiffs contain no reference to the alleged village on the Chariton River, but merely the testimony of plaintiffs' expert witness, Dr. Wallace, given without citing any supporting documents, that the Sac and Fox had a village on the Grand River (in the area presently claimed only by the Iowa plaintiffs) from 1813 to 1817 and that these tribes also had a settlement on the Lamine River (south of Cession 69) at that time and that the inhabitants of the Grand River village rejoined "the rest of the Sac along the Missouri River". (Tr. 31-32, 61: also Tr. 96-97) [295]

By 1817 all of the Sac and ostensibly all of the Fox had returned to their old villages or to new villages along the Mississippi River and its tributaries north of Cession 69, with the possible exception of the aforementioned village reported by the early settler in the southeast portion of Cession 69 and a camp of Sac reported in the Boone's Lick area (along the Missouri River below the mouth of the Chariton River) in the spring of 1818.

In 1817, Thomas Forsyth, in arriving at Fort Armstrong at the confluence of the Rock River and the Mississippi stated:

> I found that the whole of the Saukie Nation are now at their old Village on Rock River about a mile from its mouth. They told me that their Village consisted of one hundred lodges, and their numbers were 1000 men

> without counting many stout lads. Indeed I have seen many Indian Villages, but I never saw such a large one or such a populous one. They appear stationary there and their old lodges are repaired and some new ones lately built, and others building. I enquired of some of the chiefs who came from Missouri about making a new village: they said that they would remain where they were on my supposing to them that perhaps next year they would remove to the west side of the Mississippi, their answer was, that perhaps they might, but as yet they did not know. The Fox Village is within a few hundred yards of Fort Armstrong across the channel of the river and consists of twenty odd lodges and numbers about two hundred warriors, being about one half of the whole of the Nation. I was informed that many Saukies visited Malden [in Canada]. (Def. Ex. 48)

In 1818 Tanner recorded that the Fox had a few lodges on the east side of the Mississippi near Fort Armstrong and about four miles above the "Sauk" village. (Def. Ex. 25) Since the Fox villages along the Mississippi were traditionally located further north than the Sac villages, it is reasonable to assume that the balance of the Fox [296] had returned to their villages further north.

On March 24, 1820 Thomas Forsyth, the Indian agent at Fort Armstrong, wrote to Governor Clark concerning an incident which had taken place in the spring of 1818, between drunken whites of the Boone's Lick settlement and some *Sac* Indians camped near the settlement, which was located along the Missouri River below the Chariton River in the southern portion of Cession 69. The incident indicates some sort of residence by a small group of *Sac* in the Boone's Lick vicinity in 1818. (Sac and Fox Ex. 65, Tr. 376) The camp, in fact, may have been the same village reported by the early settler in 1818. The incident was enlarged by the plaintiffs and relied upon by the United States Court of Claims as the basis for their statement, *supra*, that "Sac

and Fox Agent Forsyth mentions the presence of the *Sac and Fox* [emphasis added] along and near the Missouri River and in the vicinity of the Grand River in the years 1817 to 1820." (79 Ct. Cl. 8, 18) The same incident also formed the basis for the statement by the plaintiffs and presumably was the basis for the statement of the Court of Claims, *supra*, that in 1819 there was a Sac camp near the mouth of the Grand River (*Id.*). In this the plaintiffs and the Court of Claims appear mistakenly to have credited the Sac and Fox with an extended period of occupancy at two locations based upon reference in the record to a single, temporary Sac camp.

Plaintiffs' contention, relied upon by the Court of Claims in making its statement, *supra*, that "For a time (1815-1818) there was [297] also a Sac village south of the Missouri River near Jefferson City, Missouri" (*Id.*), was based upon Sac and Fox Ex. 143, an extract from "The History of Fort Osage," stating simply that in the winter of 1813 a trading house was opened for the friendly Sacs who had been moved to the Little Moniteau, near present-day Jefferson City, which was located south of Cession 69. This evidence furnishes no basis for assuming a Sac village in that locale from 1815-1818 and *a fortiori*, lends no support to the existence of Sac and Fox villages in Cession 69.

The Court of Claims reference to a Sac camp on the Missouri River below Fort Osage in 1819 (179 Ct. Cl. 8, 18), is based on an 1819 account by George C. Sibley, the agent in charge of Fort Osage, of a party of Sac apparently camped in the vicinity of the fort while their chief, who had recently returned from visiting the British Agency in Upper Canada, tried to enlist the Osage to join them in a war against the Pawnees and Ottos. (Sac and Fox Ex. 61) Fort Osage was located south of the western portion of Cession 69, which portion is claimed only by the Iowa

plaintiffs. The Sac camp was undoubtedly on the south bank of the Missouri River, south of Cession 69, and far to the west of the portion of Cession 69 claimed by the Sac and Fox plaintiffs.

All references to the Sac and Fox villages from 1820 through 1824 show them to be along the Mississippi north of Cession 69.

When Major Morrel Marston arrived at Fort Armstrong in 1820, he reported that there was a small Sac village of 5 or 6 lodges on the left bank of the Mississippi near the mouth of the Des Moines River. [298] (Def. Ex. 51, p. 148 and Sac and Fox Ex. 137; *cf.* Tr. 312) Since we do not know whether Marston made his reference facing upstream or down, it is not possible to say whether the village was on the east or west bank of the Mississippi. At any rate, this village which was the southernmost Sac or Fox village at the time, was northeast of Cession 69.

Marston reported that the principal Sac and Fox villages in 1820 were on the point of land formed by the junction of the Rock and Mississippi Rivers, far to the northeast of Cession 69. He stated:

> The Sauk village is situated on the bank of the Rock River and about two miles from its mouth . . . The principal Fox village is on the bank of the Missippi opposite Fort Armstrong, it contains thirty five permanent lodges. (Def. Ex. 51, pp. 147-148; Sac and Fox Ex. 137; *cf.* Tr. 30)

Marston reported at the same time that there was a Fox village of about 10 lodges further north in Iowa near the mouth of the Wapsipinica River which joins the Mississippi above Rock River, and a village of about 20 lodges near the lead mines, ostensibly still farther north at Dubuque, Iowa (*Id., cf.* Dr. Gussow's statement that there was a Fox village

at the mouth of the Wapsipinica from 1800 to 1824, Def. Ex. 114, p. 13).

On June 2, 1821 Theodore L. McKenny of the Office of Indian Trade wrote to the Secretary of War proposing to move the trading house then at Fort Edwards to the "vicinity of the Sac village" because the cropping place of the Sac and Fox had been moved north from the neighborhood of Fort Edwards to about the mouth of the Iowa [299] River. (Def. Ex. 52) Dr. Gussow, the defendant's expert witness, assumed from this that the village near the mouth of the Des Moines was abandoned in 1821. (Def. Ex. 114, p. 32) The assumption was premature. On August 28, 1821 Thomas Forsyth, the Indian agent at Fort Armstrong, wrote to the Secretary of War that the Sac chiefs in the vicinity of Fort Armstrong:

> • • • wish my interference in not allowing those Sauks now residing near Fort Edwards, to plant corn another year at that place, stating to me, that, the whole nation are together, they (the Chiefs) can easily detect any depredator and give the necessary satisfaction, but when detached in many small villages and under the guidance of aspiring men who wish to be Chiefs, they (the real Chiefs) cannot command their young men as they wish to do. I have spoken to some of those Indians now residing near Fort Edwards about coming up the ensuing Spring, and the whole to live together in one village, but perhaps they will not comply. It would be agreeable to me as also to the Sauk Chiefs, if the commanding officer of Fort Edwards could be directed not to allow any Sauk or Fox Indians to plant corn or reside another year near that post. (Def. Ex. 110)

On May 12, 1822 Forsyth wrote to Lewis Cass that a new village had been built on the west side of the Mississippi at the head of the Des Moines Rapids by a few families of Sac relatives of the half blood trader Blondeau. (Def. Ex. 100) This village was located in Cession 120. (*cf.* Tr. 30)

Dr. Gussow erroneously reported this as a reoccupation of the allegedly abandoned village near the mouth of the Des Moines. (Def. Ex. 114, p. 32)

With possible reference to this new village, Forsyth wrote to the Secretary of War on June 24, 1822 that upon his arrival at Fort Edwards he was informed that a party of Sac and Fox who resided at [300] the head of the Des Moines Rapids had returned from war on June 17th bringing 20 scalps and 14 children as prisoners from the Sioux of the interior. (Sac and Fox Ex. 83)

On June 3, 1823, Forsyth again wrote to the Secretary of War, from Fort Armstrong, stating that except for five or six families at the head of the Des Moines Rapids, the whole Sac Nation was living in one village, ostensibly at Rock River. (Sac and Fox Ex. 87) On July 7, 1823 Forsyth wrote to the Secretary of War that he had informed the Sac chiefs at the head of the Des Moines rapids to come to Fort Armstrong to receive their annuities. (Sac and Fox Ex. 89)

On August 28, 1824 Forsyth reported a small Sac village on the east bank of the Mississippi at the head of the Des Moines Rapids. (Def. Ex. 47, p. 3) The defendant's expert witness, Dr. Gussow, erroneously cited this as evidence that the new village built on the west bank in 1822 was still in existence in 1824. (Def. Ex. 114, p. 32)

In summation it appears that prior to August 4, 1824, there was no Sac or Fox village in the eastern portion of Cession 69, claimed by the Sac and Fox plaintiffs, other than a possible village and/or a temporary Sac camp in the southeastern portion of Cession 69 in 1818. From 1800 until the War of 1812 the Sac and Fox villages were located principally along the Mississippi River and its principal tributaries in Iowa and Illinois from the mouth of the Des Moines River northward to Prairie du Chien, Wisconsin, with the major Sac and Fox villages located far north of

Cession 69 near the site of Fort Armstrong at [301] the confluence of the Rock and Mississippi Rivers. In 1813, in consequence of the War of 1812 some Sac and Fox began moving into Cession 50 and south of Cession 69, where, between 1814 and 1817 they established a village on the Osage River. By 1815-1816 they established either a separate Sac village and a separate Fox village or a joint Sac and Fox village on the Grand River in the western part of Cession 69 which is claimed by the Iowa plaintiffs and to which the Sac and Fox plaintiffs make no claim. About that time some Sac and Fox apparently were settled or roving along the Missouri River in the southeast portion of Cession 69 although aside from the aforementioned 1818 camp or village, there is no evidence of their having established villages in that area. With the exception of that 1818 camp or village, all of the Sac and Fox had returned to their traditional village sites northeast of Cession 69 by 1817.

As we mentioned in discussing the Iowa claims, *supra*, the presence of the Iowa village on the Chariton River from 1819 to 1822 is in further refutation of the Sac and Fox claims of exclusive use and occupancy of the additionally claimed portion of Cession 69 east of the Grand-Chariton watershed.

Sac and Fox Hunting, Mining and Warfare

The record does not support the impression created by the statements, *supra*, of the Court of Claims, to the effect that the portion of Cession 69 claimed by the Sac and Fox plaintiffs, together with Cession 50, constituted the principal Sac and Fox hunting grounds from before 1803 through 1824. From a review of the evidence, it appears that the Court was misled. The northeast corner of Cession [302] 69 (credited to the Sac and Fox by Finding 23 herein) and

Cession 50 were important hunting areas of the Sac and Fox, some of whom also hunted to varying extents in the balance of Cession 69 during that time period, particularly during the War of 1812 era. However, much of the evidence relied upon by the Court is not probative of Sac and Fox hunting in the *eastern half* of Cession 69 claimed by the Sac and Fox plaintiffs in this portion of this proceeding, and overlooks hunting and other usage of the area by other tribes. Further, as the following evaluation of the record demonstrates, there is substantial evidence that during much of this period the principal Sac and Fox hunting grounds were along the Mississippi and north and west of Cession 69 and that large numbers of Sac and Fox had abandoned the chase to mine lead along the Mississippi north of Cession 69.

In 1821 Thomas Forsyth, the Indian agent at Fort Armstrong wrote to the Secretary of War that some 20 years earlier he had spent the winter as a trader at the mouths of the Two Rivers and that the Sac and Fox "did that year hunt west of the Two Rivers towards and on the Missouri River". (Sac and Fox Ex. 74, Def. Ex. 107) This conceivably could have included a swath through the central portion of Cession 69 from east to west, including the portion claimed by the Iowa, and to the Missouri River to the west of Cession 69. It could also have included the southeastern or southwestern portion of Cession 69 or even Cession 50. [303]

In his autobiography, the Sac Chief, Black Hawk, tells of participating in many war parties against the Osage beginning about 1783 and culminating in a long campaign which terminated in 1802. He speaks of marching, ostensibly from the village he was born in on Rock River, far to the north of Cession 69, "until we reached the land of the Osages, on the *borders* of the Missouri" (emphasis supplied), indicating recognition that the Osage land extended north of the Missouri. He states that the raids were in

consequence of Osage aggressions on the Sac people, and that after heavy losses the Osage temporarily "became satisfied to remain on their own lands." When the Osage again commenced aggressions on the Sac, Black Hawk undertook their complete extermination. Having recruited 500 Sacs and Foxes and 100 Iowas, Black Hawk all but annihilated an Osage village, which act he reported, "caused those who yet remained of their nation to keep within the boundaries of their own land and cease their aggressions of our hunting grounds." After leading still another successful party against the Chippewa, Kaskaskias and Osage, Black Hawk stated, "Our enemies having now been driven from our hunting grounds, with so great loss as they sustained, we returned in peace to our village." The location of at least a portion of the Sac hunting ground is shown by Black Hawk's statement concerning the subsequent building of a fort by the Americans at the foot of the Des Moines rapids:

> I did not want a fort in our country, as we wished to go down to the Two River country in the fall and hunt, it [304] being our choice hunting ground, and we concluded that if this fort was built, it would prevent us from going there. (Def. Ex. 63, Sac and Fox Ex. 16, Tr. 103.)

As heretofore mentioned "Two Rivers" is one of the names given to the stream forming the boundary between Cession 50 and the northeast corner of Cession 69 credited to the Sac and Fox plaintiffs by Commission Finding 23, herein.

Black Hawk also speaks of making a hunting camp, reportedly after the War of 1812, on the English River, which is a branch of the Iowa River far to the north of Cession 69. (Def. Ex. 63, Sac and Fox Ex. 16, Tr. 385)

There is evidence that the Sioux were instrumental in inciting Sac and Fox warfare against the Osage in the early eighteen hundreds and took an active part in such

raids. Pike's account of his 1805-1807 expeditions states that the Sac and Fox, for many years past had made war under the auspices of the Sioux on the Santeaux, Osage, and Missouries but that peace had recently been made through the influence of the United States. (Iowa Ex. 25, p. 57; Def. Ex. 18, p. 338)

The peace which Clark referred to was apparently the Treaty of November 3, 1804 between the Sac and Fox and the United States (7 Stat. 228). Article 10 thereof contains the solemn promise and agreement that said tribes "will put an end to the bloody war which has heretofore raged between their tribes and those of the Great and Little Osages." The Commission takes judicial notice of its Finding [305] 56 in the *Osage* case, *supra,* 11 Ind. Cl. Comm. 733, 760-761, that this provision of the treaty was ineffective and that reciprocal hostilities between Osage and the Sac and Fox continued throughout the period. *Cf.* Finding 76 in the *Osage* case (*Id.,* 775-777) evidencing that northern tribes including the Sioux, Iowa, and Sac and Fox were raiding the Osage south of the Missouri in 1807 and that the Osage set out to retaliate.

The Commission also takes judicial notice of its decision in the *Osage* case to the effect that the Sac and Fox contact with the Osage preceding and following 1804 was in the region north of the Missouri River in the area north of the mouths of the Osage and Gasconade Rivers, which had formerly been widely used by the Little Osage for hunting (*Id.,* Finding 56, at 760-61); that the draft of the Osage treaty of 1808 ceding the lands in question, reserved Osage hunting rights thereto in response to and in recognition of contemporary requests that the Osage hunting rights in the Grand River area be preserved (*Id.,* 867); and that the area north of the Missouri River remained an area of Osage, Sac, etc. joint hunting use, occupancy and reciprocal

warfare through 1812 (*Id.*, Finding 110, p. 806, and Comm. Opinion at 812, 872-73, 880, 882) *Cf.* Chapman's dissertation on the Osage to the effect that the Osage occupation of the Missouri River did not end until 1822. (Sac and Fox Ex. 188, p. 95)

Usage of Cession 69 by the Sioux, Iowa and Pottawatomi for raiding the Osage has been dealt with in part in connection with our discussion, [306] *supra,* of the Iowa usage of Cession 69, and need not be repeated here.

Captain Lewis' 1808 statement that Fire Prairie was convenient to the "Kanzes" and to the principal hunting grounds of the "Ioways and Saucs", also has been discussed in our comments, *supra,* on the Iowa and will not be repeated here. It would appear however that the July 16, 1812 letter from the officers at Fort Osage to the Secretary of War, stating that the 120 miles which separated the fort and Fire Prairie from the upper settlements on the Missouri was the hunting grounds of the northern tribes, was frequented as much by Indians as any other part of Louisiana, and that some of those nations were known to be hostile, is indicative that nations other than the Sac and Fox nation hunted there. (Iowa Ex. 39)

On July 1, 1808 Governor Lewis wrote to the Secretary of War that he had held several councils with the "Shawnees, Delewares, Kickapoos, Ioways, & Soos," informing them that the renegade faction of the Osage was no longer under protection of the United States and that these tribes were at liberty to wage war against them provided they should attack in a body sufficiently large to cut the Osage off completely or drive them from their country. In consequence he was informed by a Shawnee chief of veracity that about August 10, they would assemble 1200 men on the Missouri at an island a few miles above the entrance of the Gasconade to meet the Osage returning to their village.

(Def. Ex. 101) It is not known what if anything came [307] of this. It would appear probable however that if such numbers of men assembled on the Missouri adjacent to the eastern portion of Cession 69, some of them would have hunted for sustenance in the surrounding areas, including Cession 69.

Thomas Forsyth recorded that in 1810 "the Ihowais, Kickapoos, Chippewa, Ottowa, and Pottawatimies headed by the celebrated Main Poque," passed by the Sac village on Rock River on a war expedition against the Osage, and were joined by upwards of 100 Sac. (Def. Ex. 69) Although the government interfered and put a stop to the war, it is possible that these tribes used the Sac and Fox war trail through part of Cession 69 on their way to the Osage. Defendant's expert witness, Dr. Gussow, testified, albeit without citing supporting evidence, that "hostile parties, presumably Pottawatomi, Winnebago and Rock River Sacs and Foxes lurked around Fort Mason, which had been erected [in Cession 50] early in 1812 for the protection of settlers". (Tr. 369)

The Sac and Fox plaintiffs, like the Iowa plaintiffs, base their claims upon establishment of Indian title following conquest of the bulk of the claimed territory from the Osage and their predecessors. As we have shown however, the portion of Cession 69 immediately north of the Missouri River continued to be an area of joint usage and reciprocal warfare with the Osage through 1812. Our comment in the Iowa discussion *supra,* to the effect that a plaintiff's use and occupancy of a territory wrested from other tribes could only begin [308] to develop into Indian title when such use and occupancy became exclusive and the prior rights held by the conquered tribes ceased to exist, is equally pertinent in discussing Sac and Fox conquest of their claimed territory from the Osage.

It is apparent that neither the Iowa nor the Sac and Fox plaintiffs had completed their conquest of the Osage prior to the close of 1812. Under the clean hands doctrine, tribes whose hands were yet wet with blood of recent conquest at the time they ceded the conquered lands to the United States can not expect the Indian Claims Commission, in equity, to hold that they had aboriginal title to such lands. As the Court of Claims stated in *The Sac and Fox Tribe of Indians of Oklahoma, supra,* 161 Ct. Cl. 189, 205-206:

> The status of aboriginal ownership is not accorded to tribes at the very instant they first dominate a particular territory but only after exclusive use and occupancy 'for a long time.' This is as it should be—especially under the Indian Claims Commission Act which is the charter for doing justice between the Indians and the United States. Justice would not be vindicated if a tribe were able to claim a monetary award, on the ground that it was unfairly deprived by the Government of its original ownership of property, where the lands were but recently seized by conquest from another tribe. The rights of aboriginal title must have time to take root, transforming a conquered province into domestic territory.
>
> The Claims Commission Act, which seeks to repair damage caused by United States conquest of Indian lands, should not be turned into an engine for creating aboriginal title in a tribe which itself played the role of conqueror but a few years before.

Where, as in the instant case, allied tribes and others took part in the drives against the conquered tribes and used the invaded [309] territory frequently and without leave from anyone, Indian title does not lie in the conquering tribe. (*Confederated Tribes of the Umatilla Reservation, supra,* 14 Ind. Cl. Comm. 14, 28; *cf. The Sac and Fox Tribe of Indians of Oklahoma, supra,* 161 Ct. Cl. 189, 205)

With the wars against the Osage at an end, the Osage and Sac established friendly relationships. In 1817 Forsyth

reported that the Osage and Kansas had invited the Sac to join them in a war against the Pawnee, that a small number of Osage and Kansas visited the Sac village (ostensibly near Fort Armstrong) and that the Osage had gone on to visit the British in Canada. (Def. Ex. 48; *cf.* Sac and Fox Exs. 61; 68, p. 38; and 79)[10] Such intercourse may have resulted in Osage travel through Cession 69, and the resumption of Osage hunting and trading in Cession 69 as is further indicated by the aforementioned issuance of a government license to trade with the Osage and Kickapoos at the "Fork of Grand River" in May, 1824. (Iowa Ex. 92)

Lewis and Clark's account of their 1805 explorations states that the Sac, "hunt on the waters of the Missourie low down, on the Demoin & the Mississippi on both Side of the oisconsin [Wisconsin] [310] river down to the Illinois river". (Def. Ex. 9) This description would appear to include Cession 50, the northeast corner of Cession 69, and the area to the east and north of Cessions 50 and 69. Conceivably the area on the lower Missouri might include the southeastern portion of Cession 69 as well as the southern portion of Cession 50, and the area to the south thereof.

On February 19, 1806 President Jefferson sent to Congress a report which Lewis had prepared on the Indians inhabiting the Louisiana Territory. The report states that the Sac and Fox "sometimes hunt in the country west of them towards the Missouri, but their principal hunting is on both sides of the Mississippi. (Sac and Fox Ex. 30) This again would appear to include the northeast corner

[10] Commensurate with this evidence, our 1968 Opinion in this case, 6 Ind. Cl. Comm. 496, 508-509, will be amended as follows: The last two lines on p. 508 and the first two lines on p. 509 will be changed to read: "From the beginning of their habitation of the Mississippi River area until about 1812, the Sac and Fox found themselves involved in intermittent warfare with their Osage neighbors from the south, who had their villages south of the Missouri River outside of Cession 69." See order of this date.

of Cession 69 and the country west of the Sac and Fox settlements which were principally north of Cession 69.

Pike's "Ethnography of the Mississippi," based upon his 1805-1807 explorations, records that the *Sac* hunted "on the Mississippi and its confluent streams, from the Illinois to the river Des Iowa; and on the plains west of them, which border the Missouri," and that the *Fox* hunted "on both sides of the Mississippi from the Iowa, below Prairie Des Chiens[11] to a river of that name [Upper Iowa], above said village". (Def. Ex. 18, pp. 337, 339; Iowa Ex. 25) This description does not show the Sac hunting as far south as the Missouri. It would include the northeast corner of Cession 69 along the [311] Mississippi. The plains referred to could well be the plains west of the principal Sac villages which we have seen were located north of Cession 69 along the Mississippi River and its principal tributaries including the Des Moines and Iowa Rivers. Pike's description shows the Fox hunting ground to be entirely to the north of Cession 69.

As we stated in our discussion of the Iowa, *supra*, Nicholas Boilvin, Indian agent at Prairie du Chien, Wisconsin, wrote in 1811 that the Sac, Fox and Iowa had mostly abandoned commercial hunting and had turned their attention to manufacturing lead at their mine located only sixty miles below Prairie du Chien. This evidences that by that early date commercial hunting had become of secondary importance to these tribes which by then were chiefly dependent for income on lead mining and smelting operations far to the northeast of Cession 69. John Bradbury also allegedly reported that the lead mines at Dubuque, Iowa were of great importance to the Sac and Fox who were compelled to turn to mining at that time as the game on the lands which they claimed was nearly destroyed. (Tr. 369)

[11] In Wisconsin, far to the north of Cession 69.

The magnitude and the importance of lead mines is indicated by the fact that in 1810 or 1811 alone, the Sac and Fox allegedly manufactured 400,000 pounds of lead which they exchanged for goods. (Def. Ex. 20)

The 1813 *Missouri Gazette* article cited by the Court of Claims reports a number of Sac and Fox crossing overland and also ascending the Missouri in canoes to their wintering grounds in 1813 but does [312] not disclose the location thereof. While they may well have been within the eastern portion of Cession 69, they may, with equal likelihood, have been within the western portion of Cession 69 claimed by the Iowa plaintiffs, and possibly even beyond to the west of Cession 69. (Sac and Fox Ex. 39) The Missouri River itself, as a principal thoroughfare of canoe traffic used by all the Indian tribes of the area, as well as by the English, and Americans, cannot be said to have been exclusively used and occupied. (*The Skagit Tribe of Indians* v. *United States*, Dkt. 294, 7 Ind. Cl. Comm. 292, 319 (1959))

Stephen L. Long reported from his 1819-1820 expedition up the Mississippi that:

> The Sauks, Foxes, and Ioways, hunt in the plains toward the sources of Grand river, where elk and deer are still numerous . . . (Def. Exs. 26 and 114, p. 74)

The Grand River flows through the western part of Cession 69 claimed only by the Iowa. The sources and the heads of the Grand River however are far to the north of Cession 69 in western Iowa.

Long also reported that a war party of Sac and Fox from Mississippi had recently crossed a northern tributary of the Missouri (to the northwest of Cession 69) and committed many depredations upon the Missouri Indians and upon some whites. (*Id.*)

On May 10, 1920 Benjamin O'Fallon, Indian agent at Council Bluffs, sent the Secretary of War the following account of Iowa and Sac activities far to the northwest of Cession 69: [313]

> The Ioways . . . in conjunction with the Sacks of the Mississippi continue to commit depredations on our citizens and carry on an unprovoked war against the Ottoes and Mahas[12] . . . The Indians of the Mississippi, the game of whose country has nearly exhausted, must soon resort to other means than the chase, or change their present situation. They wish to migrate, they wish to dispossess some of the nations of this river, to fatten upon their buffalo. . . (Def. Ex. 74; *cf.* Def. Ex. 75, Tr. 379-80)

On July 27, 1820 agent Sibley wrote to Governor Clark from Fort Osage, located south of Cession 69 and many miles west of the area claimed by the Sac and Fox plaintiffs, that an Indian war appeared imminent as the whites in the settlements opposite the fort were nearly all in arms and impatient to kill off all the Indians, and the Sac, Iowa, and Little Osage on the other hand seemed quite as much inclined to begin the fray. To avert the conflict he recommended that the Sac, Fox, Iowa, Kickapoo and Osage be informed prior to their setting out to the fall hunt on the Missouri, of the temper of the whites toward them and that they be advised to avoid passing through the white settlements on either side of the Missouri and not to cross the Missouri, below the Kansas River. (Iowa Ex. 66) The plaintiffs and the Court of Claims relied on this account as the basis for their statement that "Indian Agent Sibley in 1820, reported that the Sac and Fox and Iowa [314] Indians regularly made a fall hunt on the Missouri River." (179 Ct. Cl. 8, 18) It may not be ascertained from Sibley's

[12] Thomas Forsyth, the Indian agent at Fort Armstrong, to the north of Cession 69, reported that the Sac and Fox, acting on his advice, made peace with the Ottoe and "Maha" in the winter of 1821. (Def. Ex. 69).

account whether these tribes were hunting within Cession 69 at that time. It appears unlikely that they would be doing any substantial hunting in the eastern portion of Cession 69 at that time, especially in view of the more than 20,000 whites in the Boone's Lick area in the southern part of the additional territory claimed by the Sac and Fox plaintiffs (*cf.* note 2, *supra,* and our discussion of the Iowa usage of Cession 69 at note 6). It appears more probable that these tribes would pass through Cession 69 on the way to hunt on the Missouri to the west of Cession 69.

Use of an area as passage from one place to another does not, *per se,* establish exclusive use, especially where the evidence indicates that the villages of the plaintiff tribe are not so located as to require extensive use of the area, and the location of villages of other tribes indicates probable use as extensive or more extensive. *The Six Nations* v. *United States,* Dkt. 344, 12 Ind. Cl. Comm. 98, 120 (1963). In *The Caddo Tribe of Oklahoma* v. *United States,* Dkt. 226, 8 Ind. Cl. Comm. 354, 374-376 (1960), it was held that assertion of a claim to a large area, including former homes, does not establish Indian title where the land was not used or occupied by the Indians in the usual manner at the date in question, even though it was recognized that the tribe very probably crossed over the area in [315] going into Oklahoma to hunt buffalo, as they continued to do at least as late as 1825. The Commission cited the Court of Claims in *The Quapaw Tribe of Indians* v. *United States,* 128 Ct. Cl. 45, 49 (1954):

> Indian tribes, in the absence of a treaty reservation, have only an occupancy and use title, or right, the fee being in the United States, and when an Indian tribe ceases for any reason, by reduction of population or otherwise, to actually and exclusively occupy and use an area of land clearly established by clear and adequate proof, such land becomes the exclusive property

> of the United States as public lands, and the Indians lose their right to claim and assert full beneficial interest and ownership to such land; and the United States cannot be required to pay therefor on the same basis as if it were a recognized treaty reservation.

In November 1820, Major Marston at Fort Armstrong, to the north of Cession 69, gave the following account of the still flourishing Sac and Fox lead industry, in which many members of the tribe were engaged far to the north of Cession 69:

> Those of the able bodied men who do not go out to hunt are employed in digging and smelting lead at the mines on the Mississippi: In this business a part of the women are also employed, from four to five hundred thousand weight of this mineral is dug by them during a season: the loss in smelting of which is about 25 pr cent; most of it however is disposed of by them in the state that it is dug out of the mine, at about two dollars pr hundred. (Sac and Fox Ex. 137, p. 7)

As late as August 15, 1821, Thomas Forsyth, Indian agent at Fort Armstrong, wrote to the Secretary of War:

> From the great scarcity of game in the vicinity of the Mississippi River, those Sauk and Fox Indians who have no horses *to travel some distance westward* to make their [316] summer hunt, have recourse to the lead mines above this place for means to feed their families during the summer months. The Fox Indians in particular, who are very improvident, and illy provided with horses arms &c. to make a summer hunt all go up to work those mines every summer, where they find many traders plentifully provided with merchandise & provisions to purchase their lead: indeed I cannot see how the major part of the Foxes and some of the Sauks could exist without those mines. The Fox Indians always have been / and continue more so to be very jealous of the lead mines, they will not allow any white person to work any of them, and it is my opinion if white persons would insist to work those mines, some

> accidents would happen. The principle mines which the Indians have been working for these two summers past are those on Fever Creek, East side of Mississippi River. (Def. Exs. 72 and 114, pp. 68, 69; Tr. 381; emphasis added)

Although hunting continued to be of considerable importance in the early 1820's (Sac and Fox Ex. 137), the record evidences that the bulk of the Sac and Fox hunting and warring during this period was in the interior of Iowa on the fringe of the Sioux country, and to the west of Cession 69.

On March 11, 1822 Thomas Forsyth wrote to the Secretary of War that he had received a letter from the chiefs of the Sac and Fox nations who were then on the Raccoon Fork of the Des Moines River, in west central Iowa, concerning the slaying of several of their people by the Sioux. (Sac and Fox Ex. 79) On June 24 of the same year Forsyth reported that 500 Sac, Fox, and Iowa, all well mounted and armed, had set out to war against the Sioux of the interior. (Sac and Fox Ex. 83)

Relying on the plaintiffs' representations, the Court of Claims concluded that Forsyth, in an extensive report written in 1822 and [317] revised in 1827, stated that "the members of the Sac and Fox Nation would hunt 'on the waters of the Missouri River and its tributaries' and sometimes further west." (179 Ct. Cl. 8, 18) The plaintiffs' contention was in fact based upon a copy of a manuscript written by Forsyth in the summer of 1822 and sent by Forsyth to the Secretary of War on June 15, 1826. The following portion of the manuscript upon which the above passage was based reveals that the bulk of the Sac and Fox then hunted in Iowa to the north and west of Cession 69 and that a smaller group hunted the Missouri and its tributaries, (possibly within Cession 69 but not necessarily in the portion thereof

claimed by the Sac and Fox plaintiffs) and to the west of Cession 69:

> About the middle of September the Sauk Indians all commence moving from their village, they descend the Mississippi River as far as the Ihowai and Skunk Rivers, Flint Hills and River des Moine and sett out from those places W and N.W-. The Rocky River Sauks and Fox Indians most generally hunt on the head waters of the Ihowai, Skunk and des Moine Rivers. The lower village at Lewiston (head of the lower rapids on the Mississippi) hunt on the waters of Missouri River and its tributaries sometimes on the Kansas River and its branches and also west on small streams that empty themselves into the Arkansaw River. The[y] generally stop hunting when the winter begins to be severe and form themselves into Grand Encampments to pass the remainder of the winter, (they at this time are visited by Traders who go and receive their credits and also Trade with with them) on the opening of the Spring those who have traps go to Beaver hunting, others to hunt Bear and they generally finish their hunt about the 11th April. They formerly had general hunting parties or excursions before the Buffellow left their lands. (Def. Ex. 68, p. 39) [318]

In 1823 Forsyth reported that some of the principal men of the Sac nation had ascended the Kansas River to the southwest of Cession 69 in March of that year to hunt beaver and that the beaver hunters from the Missouri River (possibly the same group) had returned to their village near Fort Armstrong in mid-June; that many Sac and Fox had gone to visit Malden, Canada; still more had gone to war against the Sioux of the interior; and that still more had gone buffalo hunting towards the Sioux country and would join the war party when the hunt was over. (Sac and Fox Exs. 87, 89; Def. Ex. 77; Iowa Ex. 84)

On January 30, 1824 the trader, Russell Farnham wrote to Samuel Abbot that he had found thirty lodges of Sacs

on the Missouri two day's march above the Platte River, northwest of Cession 69, and had paid them well for their large credits. He also reported that their business with the Sac in the area of the Grand River and the Missouri (in the portion of Cession 69 claimed by the Iowa plaintiffs) was "tolerable good," but that the Iowa would not make more than 100 packs of furs. He also stated that early in the 1823 fall hunt, six Fox had been killed on the English River branch of the Iowa River far to the north of Cession 69. (Sac and Fox Ex. 92)

On March 4, 1824 Thomas Forsyth wrote to the Attorney General concerning several incidents in which Sac Indians hunting in Cession 50 [319] were beaten by whites, thus evidencing some hunting in that area at that time. (Sac and Fox Ex. 93)

In February of the same year, William Clark wrote to the Secretary of War stating that Forsyth had designated Flint Hills on the Mississippi (east of the present site of Burlington, Iowa) as the permanent trading location for the Sac, and Dirt Lodge on the "Lemoin River" (Des Moines) for their winter trade. (Iowa Ex. 93; *cf.* Def. Ex. 114, p. 77) In the autumn of 1824 certain Sac and Fox chiefs called on Forsyth to protest that Flint Hills was several hundred miles from the interior of their hunting country on the Raccoon Fork of the Des Moines river in west central Iowa. They wished permission for their traders to go to the interior because the haunts of the game animals were so far from the Mississippi that it would be a hardship, with their lack of horses, to transport their families to the hunting grounds and to transport their packs of skins, tallow and jerked meat back from the hunt. (Def. Ex. 78) However in December, 1824, Forsyth confirmed the Flint Hills designation as the permanent trading place for the Sac, and designated the settlement at Fever River, further north and also

on the east side of the Mississippi, as the permanent place of trade for the Fox, with Rock Island on the Mississippi as a central trading place for Sac, Fox, Winnebago, Kickapoo, Potawatomie and Menominee. (Def. Ex. 108)

Summation of Sac and Fox Use and Occupancy

Having reviewed the evidence of Sac and Fox use and occupancy from 1803 through 1824, the Commission is of the opinion that the [320] Sac and Fox plaintiffs have not shown that they had Indian title to the lands claimed in this portion of these proceedings inasmuch as they have not demonstrated by a preponderance of the evidence that they had actual, exclusive and continuous use and occupancy of said lands for "a long time" prior to August 4, 1824.[13] From the late 1700's until 1812, Sac and Fox usage of the south-central portion of Cession 69 was actively challenged with warfare by the Osage who looked on the territory north of the Missouri as their hunting country. There is reason to believe that numerous other tribes including the Sioux, Iowa, Kickapoo, Pottawatomi, Winnebago, Chippewa and Ottawa also used the central and southern portion of Cession 69 for raiding and incidental hunting through 1810 and perhaps later. Whereas the Sac and Fox reportedly had a village on the Grand River in the western portion of Cession 69 in 1816 (in the portion claimed by the Iowa plaintiffs) and a village and/or a camp in the southeastern portion of Cession 69 in 1818, it appears that they had no village anywhere in Cession 69 before or after these dates, and that with the possible exception of the 1818 camp and/or village all of the Sac and Fox had returned to their

[13] Even if the Court of Claims opinion (179 Ct. Cl. 8, 23) is to be construed as meaning that twenty-one years may constitute "a long time" for purposes of establishing Indian title, the Sac and Fox plaintiffs have not evidenced continuous and exclusive use and occupancy of any portion of the additionally claimed lands for that period of time prior to August 4, 1824.

traditional village sites northeast of Cession 69 by 1817. The Iowa village on the Chariton River from 1820-1822 refutes the Sac and Fox claim to exclusive use and occupancy of that area. From 1803 to 1816 the primary hunting grounds of the Sac and Fox included Cession 50, the northeast corner of Cession 69, and the area north and west of [321] Cession 69. As early as 1811 large numbers of the Sac and Fox had largely abandoned commercial hunting to engage in lead mining and smelting in northeast Iowa and northwestern Illinois. From 1817 through 1824 their primary hunting grounds and raiding activities were north and west of Cession 69.

In sum, the record as a whole does not support a conclusion that the Sac and Fox use and occupancy of the additionally claimed lands was actual, exclusive, and continuous for "a long time" prior to August 4, 1824 nor accordingly that they held Indian title to said lands.

Argument on Remand Before the Indian Claims Commission

We shall discuss *seriatum* those of plaintiffs' arguments on remand before the Commission which warrant comment.

The Iowa plaintiffs point out that in Docket 153 (Cession 262)[14] the Commission found that the Iowa owned the area north of the western portion of Cession 69 and in Docket 138 (Cession 151)[15] the lands west of Cession 69 were found to be owned in common by the Iowa and other tribes. (1969 Tr. 10) Plaintiffs would thereby infer logic in finding that the Iowa were exclusive owners of the western half of Cession 69. However it should be noted that Docket 153 involved *recognized or reservation title* based on a number

[14] *The Iowa, et al., v. United States*, 7 Ind. Cl. Comm. 98 (1959).

[15] *The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, et al., v. United States*, 15 Ind. Cl. Comm. 172 (1965).

of treaties, particularly the 1825 Treaty of Prairie du Chien and that Docket 138 was a compromise settlement and also was based on recognized title stemming from the 1825 Treaty of Prairie du Chien and the Treaty of 1830. The [322] Iowa had moved into the area west of Cession 69 after leaving Cession 69 so their presence there in 1830 doesn't, *per se*, indicate that they were there in any numbers prior to 1824 nor by inference would it create an unexplained gap in their territory if it were not found that they exclusively used and occupied all of the western half of Cession 69 for a long time prior to 1824. Nor does Docket 138 show exclusive use and occupancy by the Iowa requisite for Indian title but rather usage in common with several other tribes[18] as also appears to be the case with the additionally claimed lands in Cession 69.

Plaintiffs' comment (*Id.*) "So in all the surrounding areas you find the Iowas using and occupying that land" overlooks the fact that Iowa use and occupancy of Cession 69 and in the eastern half of Cession 69 likewise was not exclusive and in the latter area was in contravention of the Sac and Fox claims of exclusive use and occupancy.

Plaintiffs' reference (1969 Tr. 13) to Captain Stoddard's 1804 statement that the Sac and Fox claim of a certainty extended back to the Missouri River is based upon an 1804 letter in which Stoddard described the speech of a Sac and Fox council delegation as being full of repetition and destitute of connection which he attributed as possibly due to the fault of the orator or to the inaccuracy of the double interpretation. (Sac and Fox Ex. 20) He added that he was not informed as to how far their claims extended down the Mississippi River but that one thing was certain, their claim extended back to the Missouri River where some of

[18] In Docket 138 the Iowa were found to have an undivided ¼ interest with the Sac and Fox, the Omaha, and the Otoe and Missouria in the lands between Cession 69 and the Missouri River on the west.

the whites had settled. This very [323] possibly was in Cession 50 rather than Cession 69.

Plaintiffs' statement (1969 Tr. 13) that the Sac and Fox conquest of the Little Osage lands along the Missouri River was completed in 1775, has been amply refuted. We take judicial notice of the Commission opinion in the *Osage* case concerning the removal of the Missouria and Osage villages after the Sac and Fox attack of 1775. The Commission stated: "Thereafter the tribes from north of the Missouri River and the Osage continued their reciprocal warfare north and south of the Missouri River." (11 Ind. Cl. Comm. 733, 829-30) Plaintiffs' own evidence, viz., Sac and Fox Ex. 11, shows that in 1794 Truteau described the Little Osage and the Missouri as being on the right bank of the Missouri in ascending the river, 6 leagues above the Grand River, hence on the north shore in Cession 69. He said they had been living there "since several years ago". It appears from the balance of his statement that the original statement, most likely in Spanish, probably was "until several years ago," but in either event this would appear to place them in Cession 69 subsequent to 1775. See also the Sac Chief, Black Hawk's description in the 1780's of "the land of the Osages, on the *borders* of the Missouri" (Def. Ex. 63), and our discussion *supra* of the Osage continued use and warfare in the area through 1812.

Plaintiffs' comment (1969 Tr. 14) that in the *Osage* case the Commission found "that the Osage claim as of 1804 did not even reach the Missouri River on the south side" merits explanation. Therein the Commission found that the fringe area north and south of the Missouri River was an area of joint use by the Osage, Sac and others through 1812. Plaintiffs' claim to exclusive use and occupancy north of the [324] Missouri River thus fails for the same reason as did that of the Osage to the area south of the Missouri River.

Plaintiffs' statement (1969 Tr. 15) that "The Commission in the Osage case, found that [at] their zenith the Osage and the Missourias never strayed very far north of the Missouri River in their hunting competitions," is without apparent foundation (*The Osage Nation of Indians, supra,* 11 Ind. Cl. Comm. 733, 750, 760-61, 777, 795, 826, 830, 867, 872, 880, 882), and is inconsistent with plaintiffs' contentions that they owned all of Cession 69 by having conquered it from the ancient Missouria and Osage since they here allege that these tribes never occupied much of Cession 69.

Plaintiffs state (1969 Tr. 15) that the black line on the attached map[17] commencing at the mouth of the Cuivre River "reflects the Sac and Fox ownership as decided by the Commission in Docket 83 as of 1804." In Docket 83 the Commission found that the area below the Cuivre River was still contested by the Osage in 1804. The Court of Claims in confirmation stated:

> As for the smaller excluded segment, there is likewise evidence of warfare between the Osages and the Sac and Fox sufficiently close to 1804 that the Commission could decide that a conquest by the latter, if it occurred before 1804, was too recent to ground a proper claim of aboriginal title; moreover, it is a fair inference that this conflict had not subsided by the time of the Treaty of 1804 since Article 10 of the Treaty embodies the Sac and Fox solemn promise and agreement "that they will put an end to the bloody war which has heretofore raged between their tribes and those of the Great and Little Osages." (*The Sac and Fox Tribe of Indians of Oklahoma, supra,* 161 Ct. Cl. 189, 206) [325]

It appears that the line of contest extended clear across Cession 69 as late as 1812.

[17] The map which is attached hereto and made a part hereof is a more detailed version of a map used by plaintiffs' attorney during his oral argument in May of 1969.

Plaintiffs' statement that no other nations except the Little Osage and Missourias at any time ever competed with the plaintiffs for the use of Cession 69 (1969 Tr. 16) and that none of early competent observers referred to anyone else making usage of these lands (1969 Tr. 19) are obviously in error. Witness Clark's record of licenses to trade with the Kickapoo and Osage in 1824 (Iowa, Ex. 92, Tr. 466-68); Clark's 1804 record of a Sioux crossing site on the Missouri River (Iowa Ex. 20); Clark's 1815 account of Sioux, Kansas, Ottoes, Pawnees, Makas, Poncas, Chehaws and Arickaras on the Missouri River (Sac and Fox Ex. 56); Pike's 1805-1807 report of Sac and Fox raids under the auspices of the Sioux (Iowa Ex. 25, p. 57; Def. Ex. 18, p. 338); and Lewis' 1808 report of Shawnee and possibly Deleware, Kickapoo, and Sioux on the Missouri boundary of Cession 69. (Def. Ex. 101) *Cf.* Forsyth's account of an 1810 Kickapoo, Chippewa, Ottawa and Pottawatomi war party (Def. Ex. 69); Iowa Ex. 39 for reference to usage by Winnebagoes and others; and Iowa Ex. 82 for Clark's ambiguously worded 1822 list of trading licenses which is open to the interpretation that various other tribes were on the Grand and Missouri Rivers.

With respect to plaintiffs' statement (1969 Tr. 19) that all of the early observers "give descriptions that relate to hunting, to the headwaters of the Grand and Chariton Rivers, to the streams that flow into those rivers, to the prairies that lie between them," we note that the area described lies north of Cession 69, in Iowa. [326]

The plaintiffs state that the Iowa, Sac and Fox looked on the Missouri as a stream which was subject to their jurisdiction and sovereignty *(Id.)* It appears that other tribes felt similarly and that the Missouri River was a common highway for anyone intrepid or strong enough to travel it. The aforementioned *Osage* case contains excerpts from a July 1, 1808 letter from Governor Lewis to the

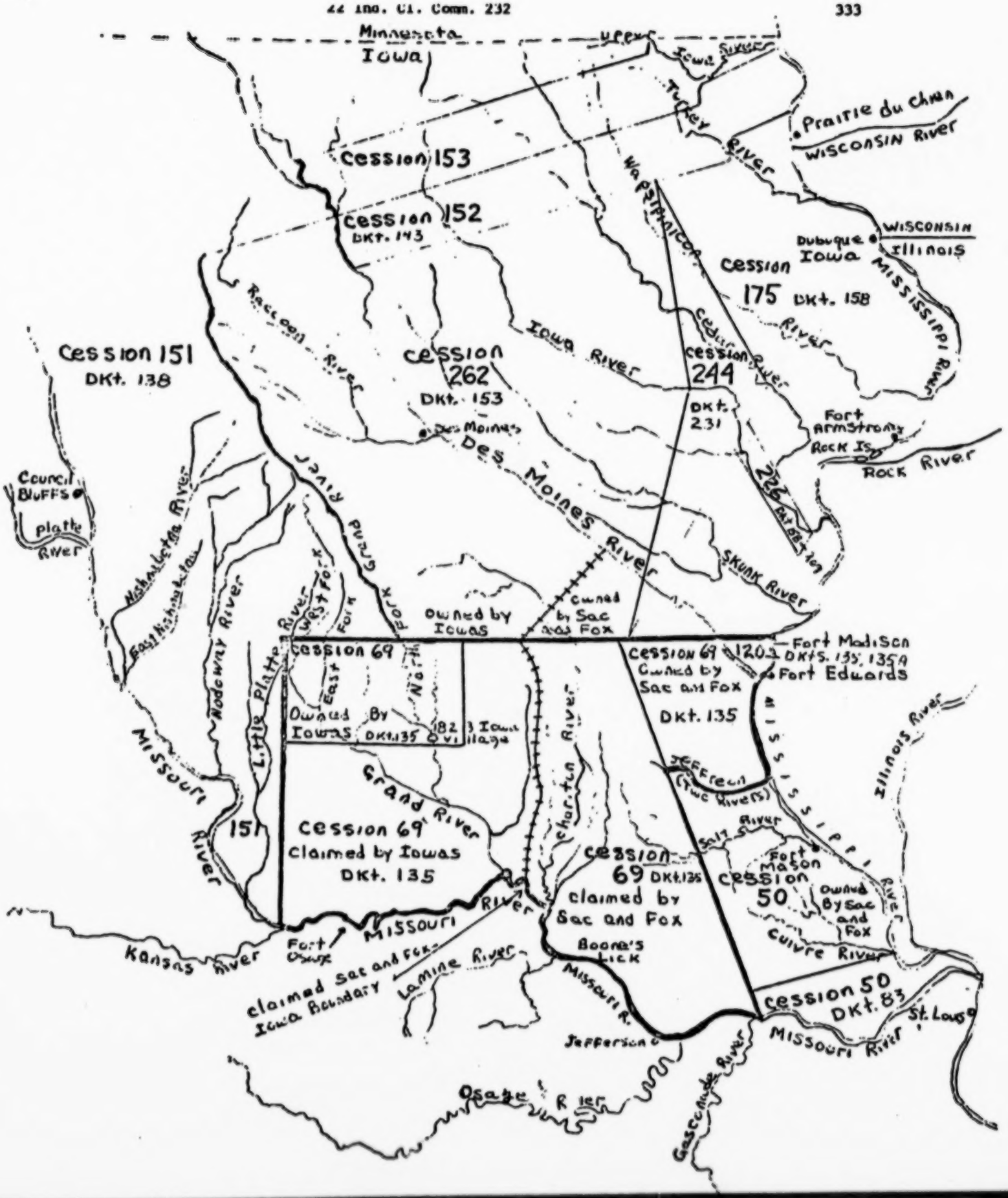
Secretary of War relating that the Kansas and Maha Indian Nations were "lying in wate to intercept the boats [of] traders on the Missouri". (11 Ind. Cl. Comm. 733, 859-60) At the November 10, 1808 Osage treaty conference White Hair, the Great Chief of the Big Osage, referred to a promise by General Clark that not a single canoe would be allowed to pass up the Missouri. In commenting thereon, the Commission stated that although this may represent a misunderstanding by the Osage, it characterizes the Osage sense of ownership and confirms their past obstructions to traders ascending that river in which the northern tribes also participated. (*Id.*, 873)

The plaintiffs' statements (1969 Tr. 19) concerning four Sac villages in the vicinity of the Cuivre River and a Sac and Fox village near the mouth of the Des Moines River are without documentary reference, and overlook the fact that said areas were outside of Cession 69.

There is no evidence of the Sac village which plaintiffs allege existed between 1812 and 1825 between the Grand and Chariton Rivers. (1969 Tr. 20) [327]

The plaintiffs' statement (1969 Tr. 21) concerning "permissive hunting" between the Iowa and the Sac and Fox overlooks the fact that hunting could not have been "permissive" until the permitting tribe had maintained exclusive use and occupancy "for a long time" and that mutual or joint hunting before such time prevents ripening of Indian title. (*Umatilla* case, *supra*)

In respect to the plaintiffs' references (1969 Tr. 22-24) to the areas peripheral to Cession 69 we are mindful that said areas, *viz.*, Cession 151 (Docket 138), Cession 262 (Docket 153), Cession 175 (Docket 158), and Cession 244 (Docket 231), all involved *recognized* rather than Indian title, and that Cessions 151, 175 and 244 all involved usage in common which would defeat a claim to Indian title.


Minnesota
Iowa
Upper Iowa River
Turkey River
Prairie du Chien
Wisconsin River
Cession 153
Cession 152
Dkt. 143
Wapsipinicon River
Dubuque
Iowa
Wisconsin
Illinois
Mississippi River
Cession 175 Dkt. 158
Raccoon River
Iowa River
Cedar River
Cession 244
Dkt. 231
Cession 151
Dkt. 138
Cession 262
Dkt. 153
Des Moines
Fort Armstrong
Rock Island
Rock River
Council Bluffs
Platte River
Nishnabotna River
East Nishnabotna
Nodaway River
Des Moines River
Skunk River
Boone River
Owned by Iowas
Owned by Sac and Fox
Cession 69
Cession 69
Owned by Sac and Fox
Dkt. 135
120 — Fort Madison
Dkts. 135, 135A
Fort Edwards
Owned By Iowas Dkt. 135
182 Iowa Village
Little Platte River
West Fork
East Fork
North
Missouri River
Grand River
Grand River
Cession 69
Claimed by Iowas
Dkt. 135
151
Chariton River
Cession 69 Dkt. 135
claimed by Sac and Fox
Missouri River
Fort Osage
Kansas River
claimed Sac and Fox-Iowa Boundary
LaMine River
Boone's Lick
Missouri R.
Jefferson City
Osage River
Gasconade River
Missouri River
St. Louis
Cession 50 Dkt. 83
Mississippi River
Illinois River
Keokuk (Two Rivers)
Salt River
Fort Mason
Cession 50
owned by Sac and Fox
Cuivre River

CONCLUSION

For the above stated reasons the Commission concludes that neither the Iowa plaintiffs nor the Sac and Fox plaintiffs have met their burden of proving by a preponderance of the evidence, their actual, exclusive and continuous use and occupancy of additional lands for a long period of time prior to August 4, 1824. Accordingly, the areas of land credited to the plaintiffs in our decision of July 2, 1958 should not be changed in any way.

MARGARET H. PIERCE, *Commissioner* [328]

We concur:

JEROME K. KUYKENDALL, *Chairman*

RICHARD W. YARBOROUGH, *Commissioner*

BRANTLEY BLUE, *Commissioner* [329]

Commissioner Vance dissents:

It is my opinion that there is substantial evidence to support findings that the Iowas had Indian title to an additional area north of the Grand River and that the Sac and Fox had Indian title to an additional area east of the Chariton River.

Further, I am of the opinion that there is substantial evidence in the record to support a finding that the Iowas and the Sac and Fox were a single identifiable group, that they were treated as such by the United States during the War of 1812 and that they had Indian title to all of Cession 69.

In the majority opinion all of the doubts are resolved against the plaintiffs. Although the Quapaw case, cited in the majority opinion at page 7, [238] states that the setting of boundary lines in a treaty of cession is *not* recognition by

the United States of Indian title to the ceded area the majority opinion uses the cession against the plaintiffs by stating the fact the Iowa and the Sac and Fox both ceded Cession 69 of the government is "further evidence of competing claims" and evidence against exclusive title in either of the tribes.

The Court of Claims remanded this case to the Commission stating that the Commission committed error "in refusing to consider the evidence of the tribes as to Indian title acquired by them between 1803 and 1824." In my opinion the majority has acknowledged the existence of substantial evidence supporting the claims of the plaintiff tribes and has by its long and well documented opinion refused to consider that evidence supporting the claim.

JOHN T. VANCE, *Commissioner* [330]

BEFORE THE INDIAN CLAIMS COMMISSION
(Caption same as precedes findings)
(Decided December 10, 1969, 22 Ind. Cls. Comm. 232)

ORDER ON REMAND AND AMENDING FINDINGS OF FACT AND OPINION

For the reasons set forth in the opinion this day filed herein, following remand by the United States Court of Claims (Appeal No. 9-65, 179 Ct. Cl. 8, 383 F.2d 991, *cert. denied* 389 U.S. 900 (1967)), the Commission concludes as a matter of law that neither the Iowa plaintiffs nor the Sac and Fox plaintiffs have met their burden of proving Indian title to additional lands as of August 4, 1824, and that while the areas of land credited to the plaintiffs in our decision of July 2, 1958 and the Final Award of May 7, 1965 therefore should not be changed in any way, pertinent

portions of our Findings of Fact and prior Opinion require amendment.

IT IS THEREFORE ORDERED, That Commission Finding 20, 6 Ind. Cl. Comm. 464, 487 be changed to read: "During the War of 1812, portions of the Sac and Fox Nation who claimed allegiance to the United States moved down from their Mississippi River sites and were found at various locations on the Salt River in Cession 50, on the Missouri River in Cession 50 and possibly in Cession 69, on the Grand River in the western portion of Cession 69 claimed herein only by the Iowa plaintiffs, and on the Osage River to the south of Cession 69."

IT IS FURTHER ORDERED, That the first full sentence of page 508 of our 1958 Opinion (6 Ind. Cl. Comm. 496, 508) be changed to read: "Reports have placed them on the Salt, Grand, and Osage Rivers"; and [331] that the last two lines of page 508 and the first two lines of page 509 of said Opinion be changed to read: "From the beginning of their habitation of the Mississippi River area until about 1812, the Sac and Fox found themselves involved in intermittent warfare with their Osage neighbors from the south, who had their villages south of the Missouri River outside of Cession 69."

Dated at Washington, D. C., this 10th day of December, 1969.

JEROME K. KUYKENDALL, *Chairman*

RICHARD W. YARBOROUGH, *Commissioner*

MARGARET H. PIERCE, *Commissioner*

BRANTLEY, BLUE, *Commissioner* [332]

IN THE

United States Court of Claims

Appeal No. 3-70

Ind. Cl. Comm. Docket No. 135

22 Ind. Cl. Comm. 232

(Decided July 14, 1971)

THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, ET AL. v. THE UNITED STATES

Nicholas Conover English, attorney of record, for The Iowa Tribe of the Iowa Reservation in Oklahoma, et al; *McCarter & English*, of counsel.

George B. Pletsch, attorney of record, for The Sac and Fox Tribe of Indians of Oklahoma, et al; *Schiff Hardin Waite Dorschel & Britton*, of counsel.

Brian Sullivan, attorney of record for The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, et al; *Dykema, Gossett, Spencer, Goodnow & Trigg*, of counsel.

Lawrence C. Mills, attorney of record for the Sac and Fox Tribe of the Mississippi in Iowa, et al; *Mills and Garreti*, of counsel.

Stanford Clinton, attorney of record for The Sac and Fox Tribe of Missouri, et al.

William W. Garner, with whom was *Assistant Attorney General Shiro Kashiwa*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, COLLINS, SKELTON, and NICHOLS, *Judges*.

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

PER CURIAM: This case pursues the claims, under the Indian Claims Commission Act, of groups of Iowa and Sac

[p. 1] and Fox Indians to additional compensation for Royce Area 69 in Missouri, which was ceded by each of those Nations to the United States in 1824. Treaties of August 4, 1824, 7 Stat. 229, 231. In prior decisions the Indian Claims Commission decided that the Iowa held aboriginal title to 1,551,200 acres in the northwest corner of Area 69, while the Sac and Fox had the same kind of ownership of 1,241,700 acres in the northeast corner of the Area (6 Ind. Cl. Comm. 496 (1958)), for which they were respectively entitled to $678,193.77 and $965,560.39 in extra compensation (less offsets) because the treaty consideration was unconscionably low (12 Ind. Cl. Comm. 487 (1963); 15 Ind. Cl. Comm. 248 (1965)). The land lying between the two separate awarded sectors was not assigned by the Commission to either the Iowas or the Sac and Fox.

On appeal by the Indians, arguing *inter alia* that the territory allocated to them was too small and that the in-between segment should also be considered theirs, this court held that, in determining the acreage to be awarded, the Commission had "committed error in refusing to consider the evidence of the tribes as to Indian title acquired by them between 1803 [when this country obtained sovereignty over the area through the Louisiana Purchase] and 1824 [when the land was ceded by the Indians to the United States by the treaties]. * * * [U]se and occupancy immediately prior to 1803, could well have been use and occupancy 'for a long time' and sufficient to constitute Indian title to the land." We remanded the case so that the Commission could consider "Indian title evidence between 1803 and 1824, so that it may determine from such evidence whether or not the land awarded to the Iowa or the Sac and Fox, or either of them, should be increased or changed in any way * * *." *Sac and Fox Tribe* v. *United States*, 179 Ct. Cl. 8, 23, 383 F.2d 991, 999, *cert. denied*, 389 U.S. 900 (1967).

The Commission then made just such a review, and in a comprehensive opinion of some 96 pages (22 Ind. Cl. Comm. 232 (1969))—which in effect constituted its new factual findings—determined, with one dissent, that "neither the Iowa plaintiffs nor the Sac and Fox plaintiffs have met their [p. 2] burden of proving by a preponderance of the evidence, their actual, exclusive and continuous use and occupancy of additional lands for a long period of time prior to August 4, 1824 [the date of the treaties of cession]. Accordingly, the areas of land credited to the plaintiffs in our decision of July 2, 1958 [6 Ind. Cl. Comm. 496] should not be changed in any way." 22 Ind. Cl. Comm. at 328.

Appealing here again, the plaintiffs have presented their case in detailed briefs totaling 295 pages. The Government's brief supporting the decision below comes to 153 pages. Oral argument has also been had. After considering this entire presentation we are compelled to conclude: first, that the controlling issues are of fact; second, that the Commission's determination of those factual questions is plainly supported by substantial evidence on the record as a whole; and, third, that this factual determination by the Commission is not infected by any relevant or significant legal error.

It would be pointless for us to discuss the myriad items of evidence (documents, other material, and testimony) which have been put forward by one side or the other, and for the most part discussed by the Commission. Suffice it to say that nothing proffered by appellants is at all decisive—no single piece of evidence, and no combination of evidential items, demands the result for which the tribes argue—and that we are convinced that the Commission made a careful and conscientious effort to comply with our mandate and to resolve the factual issue of whether aboriginal title to any of the previously unawarded parts of Area 69 was proved, in com-

bination with the evidence relating to the pre-1803 period, by the evidence dealing with the years 1803-1824. We emphasize that none of the significant historical materials in the case is so specific or so clear that it forces a determination favorable to appellants; on the contrary, almost all of the items of historical evidence are phrased in such general, unclear, or unspecific terms that the trier, sometimes with the help of expert testimony, must engage in considerable interpretation, against the document's background and in its context, to determine exact meaning and coverage. This is what the Commission painstakingly did, and, though appellants disagree vigorously with most of its readings and evaluations, it plainly acted well within its province as the trier. Where the evidence, as here, is neither sharp nor [p. 3] decisive, nor overwhelmingly one way, the fact-finding tribunal must make its own judgments and its choices. We have no option but to conclude that the evidence on which the Commission relied for its resolution of the factual questions is substantial and adequate when weighted against the record as a whole, and that the result the Commission reached is entirely reasonable.

From the appellants' viewpoint, the best that can be said is that their interpretations of the documents and the evidence are likewise reasonable. But that is obviously not enough to call for a reversal. We must stop when we conclude, as we do, that the Commission's determination is reasonable and is supported by substantial evidence on the whole record. *Osage Nation* v. *United States*, 119 Ct. Cl. 592, 603 ff., 97 F. Supp. 381, 387 ff., *cert. denied*, 342 U.S. 896 (1951); *Sac and Fox Tribe* v. *United States*, 159 Ct. Cl. 247, 253 (1962); *Sac and Fox Tribe* v. *United States*, 161 Ct. Cl. 189, 201, 203, 207, 315 F.2d 896, 902, 903, 906, *cert. denied*, 375 U.S. 921 (1963); *Confederated Tribes of the Warm Springs Reservation* v. *United States*, 177 Ct. Cl. 184, 207-08 (1966). Appellants say that the Commission went counter to certain background statements in our earlier opinion

(179 Ct. Cl. at 13-19, 383 F.2d at 993-96), but we did not intend in that historical summary, which was simply a general prelude to our consideration of the issues then before us, to bar the Commission from canvassing the evidence for itself in response to the order of remand.

We mention briefly two other matters which appellants stress. The first is the claim that the decision below is contrary to the Commission's findings and determinations in other cases involving areas near or adjacent to Cession 69. We find no disabling inconsistency. As the Commission explained, certain of the examples cited by appellants involved recognized, not aboriginal, title, and in dividing up that territory between those claiming tribes the Commission did not use, and did not have to use, the concept and standards of aboriginal title which govern the present case. The other instances given by appellants concern unnecessarily broad or general statements in earlier cases, superfluous to the actual holdings, which the Commission had the right to review, refine and correct in the current proceeding. [p. 4]

Appellants also urge that the Commission erred in holding that the Iowa and the Sac and Fox did not have joint Indian title to the unawarded land in Area 69. The court has acknowledged the general possibility that two or more tribes or groups might acquire aboriginal title by inhabiting certain territory in "joint and amicable possession" (*Sac and Fox Tribe* v. *United States, supra,* 161 Ct. Cl. at 202 n. 11, 315 F.2d at 903 n. 11; *Confederated Tribe of Warm Springs Reservation* v. *United States, supra,* 177 Ct. Cl. at 194 n. 6), but we have never purported to define the specific circumstances in which that could or would occur. The Commission was not wrong in refusing to find such joint acquisition here. The Iowas and the Sac and Fox did not consider themselves, and were not treated, as a single or closely integrated entity, but rather as separate political

groups which were friends or allies (for the most part). Their use of the same lands may have been in common—like much of Indian use of the mid-western and western regions—but the Commission could properly decide that it was not proved to be truly joint, and therefore that each separate tribe's claim to Indian title would have to be tested on its own distinct basis.

Finding a substantial foundation for the Commission's factual determinations and no pertinent error of law, we uphold the decision below.

Affirmed[p. 5]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-514

THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, et al.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners[1] pray that a writ of certiorari issue to review a judgment of the United States Court of Claims entered in the above entitled case on July 14, 1971.

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[1] The Petitioners are: The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, the Iowa Tribe of the Iowa Reservation in Oklahoma, and James Norris, Forrest Fee, Murray Campbell, Solomon Kent, Elwood Small, and Blaine Kent, appearing as the representatives and on the relation of the Iowa Tribe or Nation of Indians and as representatives and on behalf of all of the members thereof, The Sac and Fox Tribe of Indians of Oklahoma, The Sac and Fox Tribe of Missouri, Sac and Fox Tribe of the Mississippi in Iowa, and Edward Mack, Pauline Lewis, William Newashe, Charles W. Robidoux, John Connell, Dorothy Gilfillian, Thomas Green, Thomas Herrick, Kenneth Youngbear, Charles Davenport, Harry Lincoln, Albert Davenport, Edward Davenport, Percy Bear and Columbus Keahna, appearing as the representatives of and on the relation of the Confederated or United Tribes of Sac and Fox Indians and as representatives and on behalf of all of the members thereof.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Claims dated July 14, 1971, has not been reported. The slip opinion is printed at pages 162-167 in the separate appendix hereto. The opinion of the Indian Claims Commission from which the appeal to the Court of Claims was taken, as reported at 22 Ind. Cl. Comm. 232 (December 10, 1969), is printed at pages 73-161 of the separate appendix.

The first opinion of the Court of Claims in this proceeding, as reported at 179 Ct. Cl. 8, 383 F.2d 991 (March 17, 1967), is printed at pages 49-72 of the separate appendix. The petition for writ of certiorari in respect of that decision was denied by the Court, 389 U.S. 900, 88 S. Ct. 212, 220, 19 L.Ed. 2d 217 (October 16, 1967). The opinion of the Indian Claims Commission from which the first appeal to the Court of Claims was taken, as reported at 6 Ind. Cl. Comm. 464 (July 2, 1958), is printed at pages 1-48 of the separate appendix.

The decisions of the Indian Claims Commission with respect to damages and offsets, as reported at 12 Ind. Cl. Comm. 487 (August 29, 1963) and 15 Ind. Cl. Comm. 248 (May 7, 1965), are not reproduced because they are not pertinent to the issues raised by this Petition.

JURISDICTION

The judgment of the United States Court of Claims was entered on July 14, 1971. The jurisdiction of the Court is invoked under Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. § 70s(c) and 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether the intent of the Congress in enacting the Indian Claims Commission Act and in providing for the hearing and determination of all Indian claims against the United States is being carried out if meritorious land claims are denied recovery on technical legal grounds?

2. Whether Indian tribes should be permitted recovery under the Indian Claims Commission Act for lands jointly possessed but denied recovery when lands are possessed in common by such tribes or when permission to use such lands is granted to another tribe?

3. Whether the Court of Claims was correct in treating the opinion of the Indian Claims Commission as meeting the statutory requirement that the Commission make findings of fact when the Commission has stated that it has made no findings of fact?

STATUTES AND TREATIES INVOLVED

The statutory provisions and the treaties involved in this case are Sections 2, 19 and 20 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, *et seq.*, 1946, 25 U.S.C. §§ 70a, 70r and 70s, and two treaties of August 4, 1824, 7 Stat. 229 and 7 Stat. 231, with the Sac and Fox and Iowa Nations, respectively. The statutory provisions and the treaties are printed in Appendix A to this Petition at pages 20-29.

STATEMENT OF CASE[1]

This case involves claims asserted by Petitioners under the Indian Claims Commission Act of August 13, 1946 (60 Stat. 1049, 25 U.S.C. § 70 *et seq.*) to recover compensation for lands which the Sac and Fox and Iowa Nations formerly used and occupied north of the Missouri River in the present State of Missouri, and which they ceded to the United States by two treaties concluded in 1824 (7 Stat. 229; 7 Stat. 231; App. A, pp. 24-29). The location of these lands and other pertinent information are shown on the map which appears at the end of the opinion of the Court of Claims which was rendered on the first appeal to that court (Sep. App. 72) and which is reproduced as Appendix B to this Petition (p. 30).

Early in the 18th century, the Missouria Indians and their guests, the Little Osage, used and occupied portions of the lands, including the unawarded area, claimed by the Sac and Fox and Iowa Nations north of the Missouri River. Commencing in the 1720's, this usage was challenged by the Sac and Fox Nation and in 1775, the Sac and Fox, with their allies the Iowa, forced the Missourias and Little Osage to abandon their villages along the lower Missouri River. A number of years later an Osage spokesman stated that the Osage claimed no lands north of the Missouri River

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[1] The following abbreviations or definitions are sometimes used in this Petition:

Act	—Indian Claims Commission Act
App.	—Appendix which is a part of this Petition
Sep. App.	—Separate appendix to this Petition in which the opinions of the Commission and the Court of Claims are printed.
Ct. Cl. App.	—Appendix to Brief of Petitioners before the Court of Claims.
Commission	—Indian Claims Commission
Unawarded area	—The land area in northern Missouri as to which recovery was denied by the Commission.

(Sac and Fox Exhibit 67, Ct. Cl. App. 227). Commencing prior to 1775 and after that date, the Sac and Fox and Iowa together used, occupied and claimed the unawarded lands in northern Missouri.[1]

In another case (*Osage Nation of Indians* v. *United States*), 11 Ind. Cl. Comm. 733 (December 3, 1962), the Commission found that the Osage did not have Indian title as of 1803 or 1808 to any lands north of the Missouri River, and that any Osage usage of those lands after 1775 was confined to a narrow fringe area along the Missouri River (11 Ind. Cl. Comm. 733, 756, 808-809). In the present case, Respondent agreed with Petitioners that after 1775 neither the Missourias nor the Little Osage used or occupied the unawarded area and proposed the following finding in the second proceeding before the Commission on the question of title:

> "3a. The Missouria Indians, who once occupied a portion of Cession 69 [the lands north of the Missouri River], abandoned their villages within the area prior to 1775 and moved westward where they joined with the Otoe Indians. At no time after 1775 did the Missouria return to or occupy any part of Cession 69. The Osage Indians at one time used portions of Cession 69 by permission of the Missouria Indians, however, the Osage never at any time claimed Indian title to any lands north of the Missouri River." (Respondent Brief p. 26, Ct. Cl. App. 187).

In its brief to the Commission in support of its proposed finding, Respondent stated:

> "Defendant contends that the record conclusively shows that no other Indian tribes either claimed or occupied

[1] The entire claimed area is sometimes referred to in the decisions of the Commission and the Court of Claims as Cession 69 or Area 69, which is the designation used by Royce in his mapping of Indian land cessions (Map 1, 18th Annual Report of the Bureau of American Ethnography, 1896-1897, Part II, Indian Land Cessions in the United States).

> any part of Cession 69 after 1775; therefore, there could have been no *changes* in Indian title whereby petitioners acquired by conquest, purchase or exchange the lands of another Indian tribe between 1803 and 1824." (Respondent Brief p. 24, Ct. Cl. App. 186).[1]

In its initial decision in this case, the Indian Claims Commission (6 Ind. Cl. Comm. 464 (1958), Sep. App. 1), found that the Iowa Nation had Indian title to a tract of land in the northwest corner and the Sac and Fox Nation to a tract of land in the northeast corner of the area claimed in northern Missouri, and that neither tribe owned a much larger land area (the unawarded area) which was located in the center of the claimed lands and along the Missouri River (6 Ind. Cl. Comm. 464, 482, 493, Sep. App. 20, 31).

In reaching its decision as to title, the Commission held that the Iowa and Sac and Fox Nations were required to establish their Indian title to the claimed lands as of the date when the United States acquired sovereignty over the area, namely, 1803 (the date of the Louisiana purchase), and that the two tribes could not enlarge upon their title after that date (6 Ind. Cl. Comm. 464, 502, Sep. App. 39). The Commission's findings of fact were therefore confined to the evidence of Sac and Fox and Iowa use and occupancy in the period prior to 1803. On the first appeal to the Court of Claims, the Court of Claims reversed this holding of the Commission and held that the only significant date was 1824 when the lands were ceded to the United States (179 Ct. Cl. 8, 23, 383 F. 2d 991, 999, Sep. App. 63-64). The Court of Claims remanded the case to the Commission for its consideration of Indian title evidence between 1803 and 1824, pointing out that that evidence "when connected with use

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[1] Respondent attempted to avoid the effect of this concession by contending that after 1775 the unawarded area was vacant, that is, not used or occupied by the Iowa, Sac and Fox, or any other Indian tribe.

and occupancy immediately prior to 1803, could well have been use and occupancy 'for a long time' and sufficient to constitute Indian title to the land." (179 Ct. Cl. 8, 23, 383 F. 2d 991, 999, Sep. App. 65).

On December 10, 1969, the Commission rendered its second opinion in these proceedings concerning Sac and Fox and Iowa title (22 Ind. Cl. Comm. 232, Sep. App. 73). The Commission made no additional findings of fact with respect to the evidence of Sac and Fox and Iowa use and occupancy of the unawarded lands during the period 1803 to 1824. The Commission stated:

> "The Commission makes no additional findings of fact. Instead for the most part we shall limit our discussion to evidence previously alluded to, especially that cited by the plaintiffs in their appeal brief before the Court of Claims." (22 Ind. Cl. Comm. 232, 237, Sep. App. 78)

The Commission held that Petitioners had failed to establish Indian title to the unawarded lands (22 Ind. Cl. Comm. 232, 328, Sep. App. 159).

Commissioner Vance dissented from the Commission's opinion. He was of the opinion that there was substantial evidence to support findings that the Iowa and Sac and Fox had Indian title to the lands which each tribe claimed and that the Iowa and Sac and Fox were a single identifiable group which "had Indian title to all" of the claimed lands (22 Ind. Cl. Comm. 232, 329, Sep. App. 159). Commissioner Vance further said: "In the majority opinion, all of the doubts are resolved against the plaintiffs." He expressed the opinion that—

> " . . . the majority has acknowledged the existence of substantial evidence supporting the claims of the plaintiff tribes and has by its long and well documented

opinion refused to consider that evidence supporting the claim." (22 Ind. Cl. Comm. 232, 330, Sep. App. 160)

Petitioners again appealed from the Commission's decision to the Court of Claims. The errors raised on appeal include: the refusal of the Commission to make additional findings of fact as required by the Indian Claims Commission Act; the inconsistencies between the Commission's decision and its findings and opinions in other cases involving the same Petitioners or the same issues; the Commission's legal holdings that the Sac and Fox and Iowa Nations could not have joint Indian title to the unawarded area, that the two tribes could not acquire Indian title to lands used in common, and that the granting by one tribe of permission to another tribe to use its lands would prevent it from acquiring Indian title to those lands. Petitioners also contended that the Commission's opinion was not supported by and was contrary to substantial evidence because of its mistakes in construing the evidence which it considered, and of its failure to consider substantial relevant evidence.

The Court of Claims did not for the most part consider the errors which Petitioners raised on appeal. In affirming the Commission's decision, the Court of Claims treated the Commission's opinion as the equivalent of findings of fact and the issues raised on appeal as involving only factual questions (Sl. Op. pp. 2-3, Sep. App. 164).

REASONS FOR ALLOWING THE WRIT

The Indian Claims Commission Act is a broad remedial statute which provides for the hearing and determination of all Indian claims against the United States.

Following the passage of the Act, Congressman Mundt, in an extension of remarks on July 30, 1946 (Appendix to the Congressional Record A4923) stated:

> "Mr. Speaker, the passage of the Indian Claims Commission bill, H.R. 4497, by the Congress represents a great landmark in our treatment of the American Indians. By this bill the United States, as a sovereign Nation, consents that it shall be subject to suit by any Indian tribe not only upon claims that arise in law or equity under the Constitution, but also upon claims not recognized by any existing rule of law or equity, which have as their bases unfair and dishonorable dealings on the part of the United States. In other words, if any Indian tribe can prove that it has been unfairly and dishonorably dealt with by the United States it is entitled to recover. This ought to be an example for all the world to follow in its treatment of minorities."

See also *Otoe and Missouria Tribe* v. *U.S.*, 131 Ct. Cl. 593, 601-609, 131 F. Supp. 265, 271-275 (1955), *cert. den.* 350 U.S. 848, 76 S. Ct. 82, 100 L. Ed. 755 (1955).

Most of the claims asserted under the Indian Claims Commission Act arise out of transactions in which Indian tribes sold or lost their lands to the United States. Many of these claims are still pending before the Indian Claims Commission. The decisions of the Indian Claims Commission and the Court of Claims in this case bar consideration of meritorious land claims based on technical legal distinctions and therefore are contrary to the intent of the Congress that all Indian claims against the United States shall be heard and determined. The questions which are presented concern the proper administration and interpretation

of the Indian Claims Commission Act in accordance with the Congressional objectives and are therefore of substance and importance. The failure of the Indian Claims Commission to make findings of fact is contrary to the statutory requirement of the Indian Claims Commission Act and precludes effective review of the Commission's decision. None of the questions presented by this Petition has been decided by the Court.

I.

The Indian Claims Commission Act Has Not Been Administered And Interpreted In Accordance With The Intent Of Congress That All Indian Claims Against The United States Shall Be Heard And Determined.

The Indian Claims Commission and the Court of Claims have developed a definition of Indian title which limits and discriminates as to the type of land claims which are recoverable under the Indian Claims Commission Act. Although the Act is concerned with all kinds of claims, legal, equitable and moral, and does not require that land claims be based upon a particular concept of title or a particular type of interest in land, the Commission and the Court of Claims have determined that recovery under the Act is permissible only in those cases in which an Indian tribe has established either "recognized title" or "Indian title" to its lands, as those terms have been judicially and administratively defined.[1] As a consequence, various Indian claims which are based upon the use and possession of lands and which meet historical standards of Indian land ownership will be denied recovery under the Act.

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[1] Neither phrase appears in the Indian Claims Commission Act. The jurisdictional section (Sec. 2, 25 U.S.C. § 70a, App. A, pp. 20-21) is concerned with all "claims" and not with particular estates in lands.

An Indian tribe's title is recognized when it has been acknowledged by a treaty or other formal act of the United States; that kind of title is not involved in this case. Indian title has been defined by the Court of Claims in this manner (*Confederated Tribes of Warm Springs Reservation v. U.S.*, 177 Ct. Cl. 184, 194 (1966)):

> "There must be a showing of actual, exclusive[8] and continuous use and occupancy 'for a long time' prior to the loss of the land. *Sac and Fox Tribe of Oklahoma* v. *United States*, 161 Ct. Cl. 189, 315 F. 2d 896, cert. den. 375 U.S. 921 (1963) . . ."
>
> [8] Joint and amicable possession of the property by two or more tribes or groups will not defeat 'Indian title'."

There is substantial evidence in the record that the Iowa and Sac and Fox actually and continuously and together exclusively used the unawarded lands in northern Missouri for a long time. In the present case, each tribe recovered with respect to an isolated area which the Commission found in its original opinion the tribe used and occupied to the exclusion of all other Indian tribes (6 Ind. Cl. Comm. 464, 482, 493, Sep. App. 20, 31). Recovery was denied with respect to a large area (the unawarded lands) which is located between these two parcels. The Commission and the Court of Claims held, as a matter of law, (i) that two Indian tribes such as the Iowa and Sac and Fox cannot acquire Indian title to lands used in common by both tribes, and (ii) that the granting by one tribe of permission to another tribe to use its land prevents the granting tribe from perfecting its Indian title to that land. The reason given in support of those holdings is that the exclusivity requirement for Indian title is not met (22 Ind. Cl. Comm. 232, 278-282, 321-322, 326; Sep. App. 115-118, 153, 157; Sl. Op. p. 5, Sep. App. 166-67).

The footnote quotation from *Warm Springs* set forth above indicates that Indian title can be acquired by "joint and amicable possession" of lands by two tribes. However, the Commission interprets the word "joint" to require possession of land by two or more tribes which are so closely integrated as to constitute a single political entity (22 Ind. Cl. Comm. 232, 278-282, Sep. App. 115-118). Although the Sac and Fox and Iowa Nations acquired the unawarded lands by joint action and thereafter used, occupied and claimed those lands, the two tribes continued to be separate political entities and therefore could not, in the opinion of the Commission, be considered joint possessors of the unawarded lands for the purpose of acquiring Indian title to them. Although the Court of Claims stated that "we have never purported to define the specific circumstances in which [joint title] could or would occur" the Court accepted this holding of the Commission (Sl. Op. p. 5, Sep. App. 166).

Presumably, the purpose of the words "actual," "continuous," "exclusive use and occupancy", "for a long time" in the current definition of Indian title is to establish criteria by which the evidence (including conflicting evidence) of Indian land ownership may be evaluated. Certainly the definition should not be transformed into an artificial system of Indian land tenure in which the historic facts of Indian land occupancy and contemporaneous attitudes as to Indian land ownership become irrelevant and are replaced by a rigid and inflexible legalistic formula. Yet this is what has occurred. Some types of Indian land occupancy result in recoverable claims under the Indian Claims Commission Act and other types of occupancy do not, notwithstanding that the only distinction is legal and technical in character.

In the present case, the Iowa and Sac and Fox Nations could have acquired Indian title to the unawarded lands as joint tenants but they could not as tenants in common.[1] Whether the two tribes are joint owners or owners in common of the unawarded lands, the historical facts of actual, continuous, exclusive use and occupancy for a long time are the same. The only distinction is that if the Iowa and Sac and Fox are tenants in common then their usage is not exclusive of each other, but if the two tribes merged to form a single entity, their title is joint and the exclusivity test is passed.

The distinction which this rule of law establishes renders irrelevant the actual historical facts of Indian land use whenever that usage is in common by two tribes, however appealing and meritorious those circumstances may be. In the present case, the Sac and Fox and Iowa, as allies, completed the ouster of the prior Indian occupants from northern Missouri in 1775. The two tribes subsequently used, occupied and claimed ownership of these lands down to 1824 when the two tribes by nearly identical treaties ceded their interests in these lands to the United States. Ownership of the lands in northern Missouri was not in dispute between the Iowa and Sac and Fox Nations and no contemporaneous claim of ownership was asserted by any other tribe to that area. The two tribes filed a single petition under the Indian Claims Commission Act in which

[1] However, Indian tribes may recover with respect to lands used in common if they have recognized title to those lands (*Otoe and Missouria Tribe* v. *United States*, 5 Ind. Cl. Comm. 316 (1957), 13 Ind. Cl. Comm. 272 (1964), 15 Ind. Cl. Comm. 172 (1965). This distinction between recognized title and Indian title situations is without statutory basis and has nothing to do with the facts of Indian land usage.

they sought a determination of their respective interests in the claimed lands.[1]

As was the custom among many Indian tribes, each tribe, as close friends, freely granted permission to members of the other tribe to use its lands. These permissive land use arrangements between the Iowa and Sac and Fox, which were wholly compatible with contemporaneous concepts of Indian land use and ownership, had unfortunate connotations for their claims under the Act.

The Commission held also that the granting by either tribe of permission to another tribe to use its lands prevented the granting tribe from acquiring Indian title to its lands (22 Ind. Cl. Comm. 232, 279, Sep. App. 116). Its reason is that the granting tribe's use of its lands would not be exclusive if another tribe was permitted to use them. This holding is all the more puzzling because the Commission acknowledges that a tribe which has perfected Indian title to lands may grant permission to another tribe to use those lands without destroying its Indian title. That a tribe must seek permission to use lands occupied by another tribe and that tribe may grant or withhold such permission

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[1] When two tribes are friendly allies, the evidence available today may not be sufficient to establish with certainty a boundary line between their respective lands. If a present inability to locate a boundary line leads to the conclusion that the lands in question must be considered as being used in common it should not also lead to the legal conclusion that recovery under the Act for those lands is therefore barred. In the present case, one of the grounds for denying recovery for the unawarded lands was the absence of a now identifiable boundary line between the lands of Iowa and the lands of the Sac and Fox Nation (22 Ind. Cl. Comm. 232, 247 (1969), Sep. App. 87), notwithstanding that Petitioners had offered proof and expert testimony as to the probable location of such line, and that the Commission had been able to determine such a boundary line with respect to lands in Iowa immediately to the north of the unawarded area (*The Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, et al.* v. *United States,* 7 Ind. Cl. Comm. 98, 113 (1959)).

constitutes some of the best historical proof of land ownership. This evidence is equally impressive and relevant whether the permissive use arrangement occurs prior or subsequent to the date when Indian title is perfected.

The Indian Claims Commission Act contains no requirement that claims relating to lands be limited to those lands which were "exclusively" occupied by an Indian tribe "for a long time". The Sac and Fox and Iowa Nations should be entitled to recover the value of their possessory interests in the unawarded lands irrespective of whether those interests are considered the equivalent of Indian title as defined by the Commission and the Court of Claims.[1] However, if the concept of Indian title is to be retained as a means of determining Indian land claims cognizable under the Indian Claims Commission Act, then a claim should not be rendered wholly valueless merely because a tribe's title may be subject to an imperfection. At the least, the tribe should be entitled to recover the fair value of such lands reduced by the value of any title flaw.

The holdings of the Commission and the Court of Claims that Indian tribes can recover under the Indian Claims Commission Act if they have joint possession of lands but not if they possess the lands in common, and that permissive land use arrangements defeat Indian title if entered into prior to the time that Indian title is perfected but are proper after Indian title has been acquired, represent a formalistic approach to claims under the Indian Claims Commission Act which is reminiscent of the technical rules which defined the various estates in land under ancient Anglo-Saxon land tenure. Such an approach has no place in the interpretation of the Indian Claims Commission Act

[1] Such values are determined as of the date the lands are ceded to the United States. Interest is allowed only in the rare case of a constitutional taking and is not recoverable in the present case.

and results in the denial of meritorious claims and is contrary to the intent of the Congress that all Indian claims shall be heard and determined under the Act.

II.

The Failure Of The Indian Claims Commission To Make Findings Of Fact Was Contrary To Law And Precluded Petitioners From Obtaining An Effective Review Of Its Decision.

In the first opinion on title (6 Ind. Cl. Comm. 464, Sep. App. 1), the Commission's findings of fact were concerned with the period prior to 1803, the date of the Louisiana purchase. On the first appeal, the Court of Claims reversed and remanded the case to the Commission "for its consideration of Indian title evidence between 1803 and 1824, . . . " (179 Ct. Cl. 8, 23, 383 F. 2d 991, 999, Sep. App. 65).

On remand, the Commission made no additional findings of fact (22 Ind. Cl. Comm. 232, 237, Sep. App. 78). Its final determination therefore did not comply with Section 19 of the Indian Claims Commission Act which provides:

> "The final determination of the Commission shall be in writing . . . shall include (1) its findings of the facts upon which its conclusions are based; . . . and (3) a statement of its reasons for its findings and conclusions." (Sec. 19, 60 Stat. 1054, 25 U.S.C. 70r, App. 22)

On appeal, the Court of Claims must determine whether the Commission's findings of fact are supported by substantial evidence and whether its conclusions of law are valid and are supported by the Commission's findings of fact (Sec. 20, 60 Stat. 1054, 74 Stat. 829, U.S.C. § 70s, App. 22). In the present case, the Court of Claims held that the Commission had made the review contemplated by its order of remand and that its opinion "in effect constituted

its new factual findings" (Sl. Op. p. 2, Sep. App. 164). But this assumption of the Court of Claims is denied by the Commission. The disclaimer of the Commission is explicit:

> "The Commission makes no additional findings of fact. Instead for the most part we shall limit our discussion to evidence previously alluded to, especially that cited by the plaintiffs in their appeal before the Court of Claims." (22 Ind. Cl. Comm. 232, 237, Sep. App. 78)

The Commission's opinion does not even purport to address itself to the entire record; it is limited to a discussion of only some of the evidence. Moreover, the Commission's opinion does not approach the preciseness of expression required of findings of fact. Because it did not subject itself to the discipline of making findings of fact, the Commission in its opinion frequently does not come to grips with the evidence—it merely discusses some of the possibilities. Its opinion is sprinkled with catch words and phrases such as "most probable," "possibly," "problematical," "conceivably," "allegedly," and "ostensibly" (See 22 Ind. Cl. Comm. 251, 253, 257, 258, 267, 289, 293, 302, 303, 304, 311, 312, 313, 318; Sep. App. 90, 92, 95, 96, 105, 125, 128, 136, 137, 138, 144, 145, 149-150). Such tentative, alternative and vague conclusions should not be considered as the equivalent of findings of fact. (*Securities and Exchange Commission* v. *Chenery Corporation,* 318 U.S. 80, 93-94, 63 S. Ct. 454, 462, 87 L. Ed. 628, 636, (1943)).

The reasons for requiring administrative findings have been often expressed and are powerful and compelling. Clear and specific findings are essential in the facilitation of judicial review. (*B. & O. Railroad Co.* v. *Aberdeen & Rockfish Railroad Co.,* 393 U.S. 87, 93, 89 S. Ct. 280, 21 L. Ed. 2d 219 (1968); reh. den. 393 U.S. 1124, 89 S. Ct. 987 22 L. Ed. 2d 131 (1969); *National Geographic Society*

v. *District Unemployment Comp. Bd.*, 438 F. 2d 154, 158 (App. D.C. 1970)) The need for findings is especially great in a case such as the present one where there are quantities of historical evidence to consider. The reviewing court has to know what findings of fact were made by the Commission in order to determine whether those findings are sustained by the evidence and whether the Commission's decision is right or wrong. (2 Davis, K., *Administrative Law Treatise*, § 16.05, 16.09 (1958); 1970 Supp. §16.00) Here, the Court of Claims concluded that the Commission's determination was reasonable and supported by substantial evidence in the whole record (Sl. Op. p. 4, Sep. App. 165). Yet the Court of Claims' own view of the evidence was that it is "neither sharp nor decisive, nor overwhelmingly one way . . ." and that "From the appellants' viewpoint, the best that can be said is that their interpretations of the evidence are likewise reasonable." (Sl. Op. pp. 3-4, Sep. App. 165). As the Court of Claims pointed out, "appellants disagree vigorously with most of [the Commission's] reading and evaluations, . . ." (Sl. Op. p. 3, Sep. App. 165).

In his dissent to the Commission's decision, Commissioner Vance expressed the opinion that there was substantial evidence to support findings that the Iowa and Sac and Fox Indians had Indian title to the unawarded land or had joint Indian title to the entire area, and that "in the majority opinion all of the doubts are resolved against the plaintiffs . . . " (22 Ind. Cl. Comm. 232, 330, Sep. App. 159).

Although Petitioners wholeheartedly agree with the dissenting opinion expressed by Commissioner Vance, if the present case is one which is close and could be decided either way, then clearly this is a case in which it is imperative that the statutory requirement for findings of fact be followed. As Judge Frank observed "Often a strong im-

pression that, on the basis of the evidence, the facts are thus-and-so gives way when it comes to expressing that impression on paper." (*United States* v. *Forness,* 125 F. 2d 928, 942, *cert. den.* 316 U.S. 694, 62 S. Ct. 1293, 86 L.Ed. 1764 (1942)).

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Petition for Writ of Certiorari to the Court of Claims be allowed.

Respectfully submitted,

George B. Pletsch,
Attorney of Record for Petitioners and Counsel for The Sac and Fox Tribe of Indians of Oklahoma, et al.

Lawrence C. Mills,
Counsel for Sac and Fox Tribe of the Mississippi in Iowa, et al.

Stanford Clinton,
Counsel for The Sac and Fox of Missouri, et al.

Nicholas Conover English,
Counsel for The Iowa Tribe of the Iowa Reservation in Oklahoma, et al.

Brian Sullivan,
Counsel for the Iowa Tribe of the Iowa Reservation in Kansas and Nebraska, et al.

APPENDIX A

Sections 2, 19 and 20, Indian Claims Commission Act, 60 Stat. 1049, et seq., 25 U.S.C. §§ 70a, 70r and 70s

§ 70a. *Jurisdiction; claims considered; offsets and counterclaims.*

The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

All claims under this chapter may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the Commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit brought in the Court of Claims under section 250 of Title 28; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the nature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is declared to be the policy of Congress that monies spent for the removal of the claimant from one place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty or Executive Order under which the claim arose, or for expenditures made pursuant to sections 461, 462, 463, 464, 465, 466—470, 471—473, 474, 475, 476—478 and 479 of this title, save expenditures made under section 465 of this title, or for expenditures under any emergency appropriation or allotment made subsequent to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public work and public projects for the relief of unemployment or to increase employment, and for work relief (including the Civil Works Program) shall not be a proper offset against any award. (Aug. 13, 1946, ch. 959, § 2, 60 Stat. 1050.)

• • • • •

§ 70r. *Final determinations of Commission.*

The final determination of the Commission shall be in writing, shall be fi'.d with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant and, if so, the amount thereof; (b) whether there are any allowable offsets, counterclaims, or other deductions, and, if so, the amount thereof; and (3) a statement of its reasons for its findings and conclusions. (Aug. 13, 1946, ch. 959, § 19, 60 Stat. 1054.)

§ 70s. *Review by Court of Claims and Supreme Court.*

(a) In considering any claim the Commission at any time may certify to the Court of Claims any definite and distinct questions of law concerning which instructions are desired for the proper disposition of the claim; and thereupon the Court of Claims may give appropriate instructions on the questions certified and transmit the same to the Commission for its guidance in the further consideration of the claim.

(b) When the final determination of the Commission has been filed with the clerk of said Commission the clerk shall give notice of the filing of such determination to the parties to the proceeding in manner and form as directed by the Commission. At any time within three months from the date of the filing of the determination of the Commission with the clerk either party may appeal from the determination of the Commission to the Court of Claims, which Court shall have exclusive jurisdiction to affirm, modify, or set aside such final determination. In similar manner and with like effect either party may appeal to the Court of Claims from any interlocutory determination by the Commission establishing the liability of the United States notwithstanding such determination is not for any reason whatever final

as to the amount of recovery; and any such interlocutory appeal shall be taken on or before January 1, 1961, or three months from such interlocutory determination, whichever is later: *Provided,* That the failure of either party to appeal from any such interlocutory determination shall not constitute a waiver of its right to challenge such interlocutory determination in any appeal from any final determination subsequently made in the case. On said appeal the Court shall determine whether the findings of fact of the Commission are supported by substantial evidence, in which event they shall be conclusive, and also whether the conclusions of law, including any conclusions respecting "fair and honorable dealings", where applicable, stated by the Commission as a basis for its final determination, are valid and supported by the Commission's findings of fact. In making the foregoing determinations, the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. The Court may at any time remand the cause to the Commission for such further proceedings as it may direct, not inconsistent with the foregoing provisions of this section. The Court shall promulgate such rules of practice as it may find necessary to carry out the foregoing provisions of this section.

(c) Determinations of questions of law by the Court of Claims under this section shall be subject to review by the Supreme Court of the United States in the manner prescribed by section 288 of Title 28. (Aug. 13, 1946, ch. 959, § 20, 60 Stat, 1054; Sept. 8, 1960, Pub. L. 86-722, 74 Stat. 829.)

• • • • •

TREATY WITH THE SOCK AND FOXES, AUGUST 4, 1824, 7 STAT. 229

To perpetuate peace and friendship between the United States and the Sock and Fox tribes or nations of Indians, and to remove all future cause of dissensions which may arise from undefined territorial boundaries, the President of the United States of America, by William Clark, Superintendent of Indian Affairs, and sole Commissioner specially appointed for that purpose, of the one part, and the undersigned Chiefs and Head Men of the Sock and Fox tribes or nations, fully deputized to act for and in behalf of their said nations, of the other part, have entered into the following articles and conditions, viz:

ARTICLE 1st. The Sock and Fox tribes or nations of Indians, by their deputations in council assembled, do hereby agree, in consideration of certain sums of money, &c. to be paid to the said Sock and Fox tribes, by the Government of the United States, as hereinafter stipulated, to cede and forever quit claim, and do, in behalf of their said tribes or nations, hereby cede, relinquish, and forever quit claim, unto the United States, all right, title, interest, and claim, to the lands which the said Sock and Fox tribes have, or claim, within the limits of the state of Missouri, which are situated, lying, and being, between the Mississippi and Missouri rivers, and a line running from the Missouri, at the entrance of Kansas river, north one hundred miles to the Northwest corner of the state of Missouri, and from thence east to the Mississippi. It being understood, that the small tract of land lying between the rivers Desmoin and the Mississippi, and the section of the above line between the Mississippi and the Desmoin, is intended for the use of the half-breeds belonging to the Sock and Fox nations; they holding it, however, by the same title, and in the same manner, that other Indian titles are held.

Article 2d. The Chiefs and Head Men who sign this convention, for themselves and in behalf of their tribes, do acknowledge the lands east and south of the lines described in the first article, so far as the Indians claimed the same, to belong to the United States, and that none of their tribes shall be permitted to settle or hunt upon any part of it, after the first day of January, 1826, without special permission from the Superintendent of Indian Affairs.

Article 3d. It is hereby stipulated and agreed, on the part of the United States, as a full consideration for the claims and lands ceded by the Sock and Fox tribes in the first article, there shall be paid to the Sock and Fox nations, within the present year, one thousand dollars in cash, or merchandize; and in addition to the annuities stipulated to be paid to the Sock and Fox tribes by a former treaty, the United States do agree to pay to the said Sock tribe, five hundred dollars, and to the Fox tribe five hundred dollars, annually, for the term of ten succeeding years; and, at the request of the Chiefs of the said Sock and Fox nations, the Commissioner agrees to pay to Morice Blondeau, a half Indian of the Fox tribe, the sum of five hundred dollars, it being a debt due by the said nation to the aforesaid Blondeaux, for property taken from him during the late war.

Article 4th. The United States engage to provide and support a Blacksmith for the Sock and Fox nations, so long as the President of the United States may think proper, and to furnish the said nations with such farming utensils and cattle, and to employ such persons to aid them in their agriculture, as the President may deem expedient.

Article 5th. The annuities stipulated to be paid by the 3d article, are to be paid either in money, merchandise, provisions, or domestic animals, at the option of the aforesaid tribes, and when the said annuities or part thereof is paid

in merchandise, it is to be delivered to them at the first cost of the goods at St. Louis, free from cost of transportation.

ARTICLE 6th. This treaty shall take effect and be obligatory on the contracting parties so soon as the same shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof.

In testimony whereof, the said William Clark, commissioner as aforesaid, and the chiefs and head men of the Sock and Fox tribes of Indians as aforesaid, have hereunto set their hands, at Washington City, this fourth day of August, in the year of our Lord one thousand eight hundred and twenty-four.

William Clark, [L.S.]
Socks:
Pah-sha-pa-ha, or Stubbs, his x mark, [L.S.]
Kah-kee-kai-maik, or All Fish, his x mark, [L.S.]
Wash-kee-chai, or Crouching Eagle, his x mark, [L.S.]
Kee-o-kuck, or Watchful Fox, his x mark, [L.S.]
Kah-kee-kai-maik, or All Fish, his x mark, [L.S.]
Sah-col-o-quoit, or Rising Cloud, his x mark, [L.S.]
Foxes:
Fai-mah, or the Bear, his x mark, [L.S.]
Ka-pol-e-qua, or White Nosed Fox, his x mark, [L.S.]
Pea-mash-ka, or the Fox winding his horn, his x mark, [L.S.]
Kee-sheswa, or the Sun, his x mark, [L.S.]

Witnesses at signing:

Thomas L. McKenney,
Law. Taliaferro, Indian agent at St. Peter's,
G. W. Kennerly, Indian agent,
A. Baronet Vasques, acting S. I. A. and Int.
Maurice Blondeau,
L. T. Honore,
Jno. W. Johnson,
Meriwether Lewis Clark,
Noal Dashnay.

TREATY WITH THE IOWA, AUGUST 4, 1824, 7 STAT. 231

Articles of a Treaty made and concluded at the City of Washington, on the fourth day of August, one thousand eight hundred and twenty-four, between William Clark,

Superintendent of Indian Affairs, being specially authorized by the President of the United States thereto, and the undersigned Chiefs and Head men, of the Ioway Tribe or Nation, duly authorized and empowered by the said Nation.

ARTICLE 1st. THE Ioway Tribe or Nation of Indians by their deputies, Ma-hos-kah, (or White Cloud,) and Mah-ne-hah-nah, (or Great Walker,) in Council assembled, do hereby agree, in consideration of a certain sum of money, &c. to be paid to the said Ioway Tribe, by the Government of the United States, as hereinafter stipulated, to cede and forever, quit claim, and do, in behalf of their said Tribe, hereby cede, relinquish, and forever quit claim, unto the United States, all right, title, interest, and claim, to the lands which the said Ioway Tribe have, or claim, within the State of Missouri, and situated between the Mississippi and Missouri rivers and a line running from the Missouri, at the mouth or entrance of Kanzas river, north one hundred miles, to the northwest corner of the limits of the state of Missouri, and, from thence, east to the Mississippi.

ARTICLE 2d. It is hereby stipulated and agreed, on the part of the United States, as a full compensation for the claims and lands ceded by the Ioway Tribe in the preceding article, there shall be paid to the said Ioway tribe, within the present year, in cash or merchandise, the amount of five hundred dollars, and the United States do further agree to pay to the Ioway Tribe, five hundred dollars, annually, for the term of ten succeeding years.

ARTICLE 3d. The Chiefs and Head Men who sign this Treaty, for themselves, and in behalf of their Tribe, do acknowledge that the lands east and south of the lines described in the first article, (which has been run and

marked by Colonel Sullivan,) so far as the Indians claimed the same, to belong to the United States, and that none of their tribe shall be permitted to settle or hunt upon any part of it, after 1st day of January, one thousand eight hundred and twenty-six, without special permission from the Superintendent of Indian Affairs.

ARTICLE 4th. The undersigned Chiefs, for themselves, and all parts of the Ioway tribe, do acknowledge themselves and the said Ioway Tribe, to be under the protection of the United States of America, and of no other sovereign whatsoever; and they also stipulate, that the said Ioway tribe will not hold any treaty with any foreign powers, individual state, or with individuals of any state.

ARTICLE 5th. The United States engage to provide and support a blacksmith for the Ioway Tribe, so long as the President of the United States may think proper, and to furnish the said Tribe with such farming utensils and cattle, and to employ such persons to aid them in their agriculture, as the President may deem expedient.

ARTICLE 6th. The annuities stipulated to be paid by the second article, to be paid either in money, merchandise, provisions, or domestic animals, at the option of the aforesaid Tribe; and when the said annuities, or any part thereof, is paid in merchandise, it is to be delivered to them at the first cost of the goods at St. Louis, free from cost of transportation.

ARTICLE 7th. This Treaty shall take effect, and be obligatory on the contracting parties, so soon as the same shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof.

In testimony whereof, the said William Clark, commissioner as aforesaid, and the chiefs and head men of the

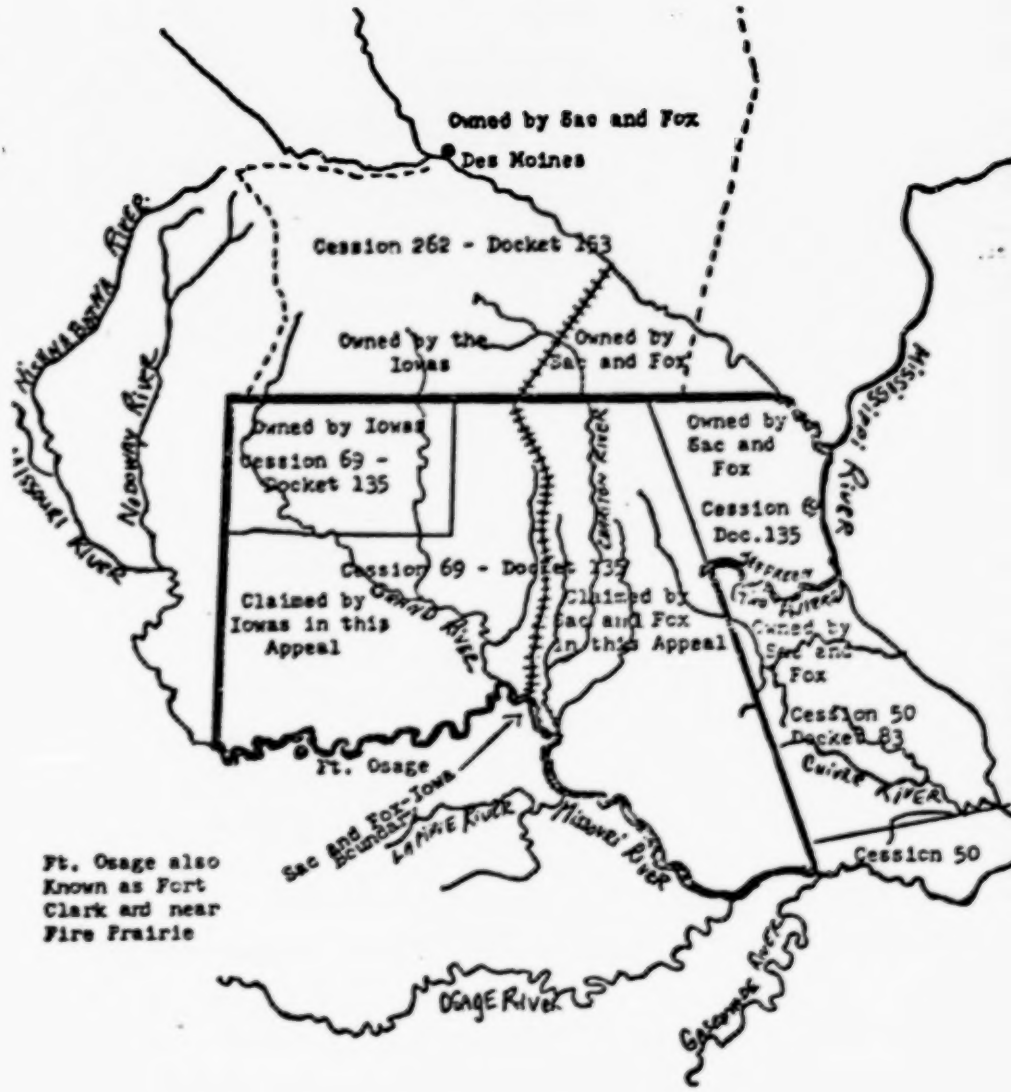
Ioway tribe of Indians, as aforesaid, have hereunto set their hands the day and year first before written.

Wm. Clark,
Ma-hos-kah, (White Cloud,) his x mark,
Mah-ne-hah-nah, (Great Walker,) his x mark.

Witnesses present:

Thos. L. McKenney,
G. W. Kennerly, Indian agent,
Law. Taliaferro, Indian agent at St. Peter's,
A. Baronet Vasques, acting subsistence agent and interpreter,
Meriwether Lewis Clark,
John W. Johnson,
William P. Clark,
William Radford.

APPENDIX B


Owned by Sac and Fox
Des Moines
Cession 262 - Docket 163
Owned by the Iowas
Owned by Sac and Fox
Owned by Iowas
Cession 69 - Docket 135
Owned by Sac and Fox
Cession 69 - Docket 135
Claimed by Iowas in this Appeal
Claimed by Sac and Fox in this Appeal
Owned by Sac and Fox
Cession 50 Docket 83
Ft. Osage
Sac and Fox-Iowa Boundary
Cession 50
Ft. Osage also Known as Fort Clark and near Fire Prairie
OSAGE RIVER
Missouri River
Mississippi River
Nodaway River
Grand River

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No. 71-514

In the Supreme Court of the United States

OCTOBER TERM, 1971

THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

SHIRO KASHIWA,
Assistant Attorney General,

A. DONALD MILLER,
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Washington, D. C. 20530.

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THE IOWA TRIBE OF THE IOWA RESERVATION IN KANSAS AND NEBRASKA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. Separate App. 162-167) is not yet reported. The opinion of the Indian Claims Commission (Pet. Separate App. 73-161) rendered on remand is reported at 22 Ind. Cl.Comm. 232. The prior opinion of the Court of Claims is reported at 179 C.Cls. 8, 383 F.2d 991. The original opinion of the Indian Claims Commission (Pet. Separate App. 1-48) is reported at 6 Ind. Cl.Comm. 464.

JURISDICTION

The judgment of the Court of Claims was entered on July 14, 1971. The petition for a writ of certiorari was filed on October 12, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1). See Section 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1054, 25 U.S.C. 70s(c).

QUESTIONS PRESENTED

1. Whether the finding of the Indian Claims Commission that the petitioners did not have aboriginal title to the lands involved was supported by substantial evidence.

2. Whether the 96-page opinion of the Indian Claims Commission meets the statutory requirement that the Commission make findings of fact.

STATUTE INVOLVED

Section 19 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054, 25 U.S.C. 70r, provides in pertinent part:

> The final determination of the Commission shall be in writing, shall be filed with its clerk, and shall include (1) its findings of the facts upon which its conclusions are based; (2) a statement (a) whether there are any just grounds for relief of the claimant * * *.

STATEMENT

Petitioners originally filed a petition with the Indian Claims Commission seeking to recover additional compensation for lands petitioners claimed by aboriginal and/or recognized title. The claimed lands (known as Cession 69) are in north-central and northeastern Missouri and were ceded to the United States by each tribe by separate but similar treaties signed on August 4, 1824. 7 Stat. 229 and 7 Stat. 231. The Commission held in its original opinion that each petitioner had aboriginal title to a separate portion of these lands, but further held that the central area between the areas awarded to each was held by neither. 6 Ind. Cl. Comm. 464, 482, 493. This decision was appealed to the United States Court of Claims on several grounds, including the claim that the Commission erred in holding that aboriginal title could not be acquired against the United States after the United States acquired the lands by the Louisiana Purchase in 1803. 6 Ind. Cl. Comm. at 502. The Court of Claims affirmed in part, and reversed and remanded only to the extent of requiring the Commission to determine whether either petitioner acquired aboriginal title after 1803 to any portion of the unawarded central area. *Sac and Fox Tribe* v. *United States*, 179 C. Cls. 8, 23, certiorari denied, 389 U. S. 900.

On remand, the Commission reconsidered its original holding to determine if petitioners had acquired aboriginal title to additional lands between 1803 and

the treaties of 1824. 22 Ind.Cl.Comm. 232. The Commission found (*id.* at 237; Pet. Separate App. 77-78):

> After examining the record with particular attention to the matters pointed out by the Court of Claims in its decision on remand and after considering the new briefs and oral arguments of the parties, the Commission concludes for reasons which will be discussed in detail that the plaintiffs have not met their burden of proving actual, exclusive and continuous use and occupancy of additional lands for a long period of time prior to 1824 and that the areas of land credited to the plaintiffs in our previous decision should not be changed in any way.

On petitioners' appeal, the Court of Claims, in a *per curiam* opinion, was "compelled to conclude" (Pet. Separate App. 164):

> * * * first, that the controlling issues are of fact; second, that the Commission's determination of those factual questions is plainly supported by substantial evidence on the record as a whole; and, third, that this factual determination by the Commission is not infected by any relevant or significant legal error.

The court emphasized that nothing in the voluminous record proffered demands the result for which the petitioners argue and that "the Commission made a careful and conscientious effort to comply with our mandate and to resolve the factual issue * * *" (Pet. Separate App. 164-165).

ARGUMENT

1. Petitioners contend that the Commission and the Court of Claims erred in failing to recognize the joint or common title of the petitioners' tribes in lands which they occupied "together exclusively" (Pet. 11). It is not seriously contended that the Commission or the Court of Claims misunderstood the law of aboriginal title as it has heretofore been recognized or that the Commission lacked substantial evidence to support its application of that law to the facts of this case. Rather petitioners urge this Court to formulate a new rule of aboriginal title which would recognize common ownership by tribes in lands which they used "together exclusively" (Pet. 11). The rule urged by the petitioners is contrary to all authority on aboriginal title, and would have no application to the facts of this case as found by the Commission.

The test applied by the Commission was that a claimant tribe must show "actual, exclusive and continuous use and occupancy of * * * lands for a long period of time" (Pet. Separate App. 78) in order to establish aboriginal title. This is the only recognized test of aboriginal title and has received repeated and consistent use and approval.[1] It is not

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[1] *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 338-339; *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 345; *Buttz* v. *Northern Pacific R.R.*, 119 U.S. 55, 69-70; *Worcester* v. *Georgia*, 6 Pet. 515, 559; *Johnson and Graham's Lessee* v. *McIntosh*, 8 Wheat. 543; *Confederated Tribes of Warm Springs Reservation* v. *United States*, 177 C.Cls. 134, 194; *Red Lake, Pembina and White Earth Bands*

claimed in the petition that the Commission's findings and application of this rule were unsupported by substantial evidence.

Indeed, the Commission's findings not only established that neither petitioner tribe proved actual exclusive and continuous use and occupancy of the portion of the unawarded lands which each claimed separately, but also showed that, even considered jointly, they did not "together exclusively" (Pet. 11) occupy the claimed lands. Thus the rule urged by the petitioners has no application to their own case.

With respect to the Iowa, the Commission found (Pet. Separate App. 114-115):

> Whereas they had one or two villages at a time at several locations within the additionally claimed territory beginning with the War of 1812 through 1824, they had no villages in the area prior to the War of 1812, and from 1815 through 1823 the principal Iowa villages were outside of the claimed territory. Whereas some members of the tribe hunted and participated in war parties intermittently in the claimed territory prior to the War of 1812, their use thereof was by no means exclusive but rather was challenged with reciprocal warfare and hunting by the Osage throughout that period. The Winnebago, Sioux, and Sac, and probably the Pottawatomi also made use of the claimed territory

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v. *United States*, 164 C.Cls. 389, 393; *Spokane Tribe* v. *United States*, 163 C.Cls. 58, 66; *Sac and Fox Tribe* v. *United States*, 161 C.Cls. 189, 201-202, certiorari denied, 375 U.S. 921; *Quapaw Tribe* v. *United States*, 128 C.Cls. 45, 49-50; *Snake or Piute Indians* v. *United States*, 125 C.Cls. 241, 254.

for raiding and hunting between 1803 and 1812, and the Sac and Fox each had a village on the Grand River in 1816.

With respect to the Sac and Fox, the Commission found (Pet. Separate App. 152-153):

> From the late 1700's until 1812, Sac and Fox usage of the south-central portion of Cession 69 was actively challenged with warfare by the Osage who looked on the territory north of the Missouri as their hunting country. There is reason to believe that numerous other tribes including the Sioux, Iowa, Kickapoo, Pottawatomi, Winnebago, Chippewa and Ottawa also used the central and southern portion of Cession 69 for raiding and incidental hunting through 1810 and perhaps later. Whereas the Sac and Fox reportedly had a village on the Grand River in the western portion of Cession 69 in 1816 (in the portion claimed by the Iowa plaintiffs) and a village and/or a camp in the southeastern portion of Cession 69 in 1818, it appears that they had no village anywhere in Cession 69 before or after these dates, and that with the possible exception of the 1818 camp and/or village all of the Sac and Fox had returned to their traditional village sites northeast of Cession 69 by 1817. The Iowa village on the Chariton River from 1820-1822 refutes the Sac and Fox claim to exclusive use and occupancy of that area. From 1803 to 1816 the primary hunting grounds of the Sac and Fox included Cession 50, the northeast corner of Cession 69, and the area north and west of Cession 69. As early as 1811 large numbers of the Sac and Fox had largely abandoned commercial hunting to engage in lead mining and smelting in

northeast Iowa and northwestern Illinois. From 1817 through 1824 their primary hunting grounds and raiding activities were north and west of Cession 69.

While these findings were made in support of the Commission's ruling that neither tribe had exclusive possession of the areas each claimed separately, they also show that the two did not "together exclusively" occupy those lands. Neither tribe had substantial villages in the area and numerous other tribes, including the Osage, the Winnebago, the Sioux, the Pottawatomi, the Kickapoo and the Chippewa hunted and raided in the area until 1810 or 1812. Thus even considered together, the petitioners did not have actual exclusive and continuous possession and occupancy of the claimed lands for a long period of time prior to 1824.

The exclusive use and occupancy test is a wholly proper standard designed to give workable dimension and content to contemporaneous notions of land use by peoples who had no concept of land title or property in land. Cf. *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U. S. 335, 357 (Jackson, J. concurring).

2. Petitioners' second argument, that the Commission did not make findings on remand, is highly technical and presents no substantial question. A court or administrative agency is not required to make specific numbered and stated findings of fact as long as the conclusions are sufficiently definite to permit judicial review on appeal. *Beaumont, S. L. & W. Ry.* v.

United States, 282 U.S. 74, 86-87; *Braniff Airways, Inc.* v. *Civil Aeronautics Board*, 306 F.2d 739, 742 (C.A. D.C.). Cf. *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173. The Commission's original findings of fact, 6 Ind.Cl.Comm. 464, together with subsequent 96-page opinion, were sufficient to permit the Court of Claims to perform its appellate function, and satisfy the requirements of Section 19 of the Indian Claims Commission Act, 60 Stat. 1054, 25 U.S.C. 70r.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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